**HTH Corporation, Pacific Beach Corporation, and KOA Management, LLC, a single employer, d/b/a Pacific Beach Hotel *and* International Longshore and Warehouse Union, Local 142.** Cases 37–CA–007965, 37–CA–008064, 37–CA–008094, 37–CA–008096, 37–CA–008097, 37–CA–008112, 37–CA–008113, and 37–CA–008145.

October 24, 2014

## DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND SCHIFFER

On September 13, 2011, Administrative Law Judge John J. McCarrick issued the attached decision.[1] The Respondents filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondents filed a reply brief. In addition, the General Counsel filed cross-exceptions and a supporting brief, the Respondents filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, to modify his remedy, and to adopt the recommended Order as modified and set forth in full below.

### AMENDED REMEDY

During the Respondents' 10-year history of violations before us and the Federal courts, we have imposed our usual remedies and secured Section 10(j) injunctions.[3] In addition to the egregious and pervasive violations we find today,[4] we have found in prior decisions that the Respondents maintained an overbroad solicitation policy and threatened and coerced employees (which made it necessary for us to overturn election results and rerun the

[1] On November 21, 2011, after the judge issued his decision, the United States District Court for the District of Hawaii issued an injunction under Sec. 10(j) of the National Labor Relations Act, ordering the Respondents to offer immediate reinstatement to unlawfully discharged employee Rhandy Villanueva; immediately rescind, at the Union's request, unilateral changes to bargaining unit employees' terms and conditions of employment; provide requested information to the Union; and post the order and have it read aloud. *Frankl v. HTH Corp.*, 825 F.Supp.2d 1010 (D. Haw. 2011), affd. 693 F.3d 1051 (9th Cir. 2012).

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondents violated Sec. 8(a)(5) and (1) of the Act by unilaterally suspending matching contributions to employee 401(k) accounts from January 1 to May 1, 2010, we do not rely on his discussion of the impossibility of impasse in negotiations on June 24, 2010.

Although fully discussed in his decision, the judge inadvertently failed to specifically state that certain refusals to furnish requested information by the Respondents violated Sec. 8(a)(5) and (1). Therefore, we clarify that, in addition to the refusals to furnish information specifically found by the judge, the Respondents unlawfully refused to respond to (a) the Union's June 18, 2010 request for a copy of employee Rhandy Villanueva's May 20, 2010 written warning and all statements and notes that the Respondents considered before disciplining Villanueva, and (b) the Union's July 26 and August 6, 2010 requests for the Respondents' investigative records and any other documents that they relied on in discharging Villanueva. We correct these omissions by the judge and find that this conduct violated the Act as alleged.

There are no exceptions to the judge's finding that the Respondents violated Sec. 8(a)(1) by disparaging the Union by informing employees that union representatives Dave Mori and Carmelita Labtingao were banned from the hotel. There are also no exceptions to the judge's findings that the Respondents violated Sec. 8(a)(5) and (1) by substantially refusing to respond to the Union's November 24, 2009 request for information related to their cessation of 401(k) plan matching contributions, and by refusing to respond to the Union's July 16, 2010 request for information related to Villanueva's suspension.

We agree with the judge that Rhandy Villanueva's warning, suspension, and discharge were unlawful under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). We do not rely on the judge's recitation of the *Wright Line* standard, however, to the extent it implies that the General Counsel must establish a separate "nexus" element in his initial burden. See, e.g., *Mesker Door*, 357 NLRB No. 59, slip op. at 2 fn. 5 (2011) (noting that there is no "nexus" element in the General Counsel's initial burden under *Wright Line*).

In accordance with the General Counsel's request, we shall correct the judge's description of the collective-bargaining unit set forth in his decision and in his recommended Order and notice.

[3] See *HTH Corp.*, 356 NLRB No. 182 (2011); *Pacific Beach Corp.*, 344 NLRB 1160 (2005) (finding actions interfered with second election); *Pacific Beach Hotel*, 342 NLRB 372 (2004) (finding actions interfered with initial election). See also *Frankl v. HTH Corp.*, 832 F.Supp.2d 1179 (D. Haw. 2011) (granting contempt relief); *Frankl v. HTH Corp.*, 825 F.Supp.2d 1010 (granting Sec. 10(j) injunction), affd. 693 F.3d at 1061–1067; *Norelli v. HTH Corp.*, 699 F.Supp.2d 1176 (D. Haw. 2010) (granting Sec. 10(j) injunction), and 699 F.Supp.2d 1208 (ordering Sec. 10(j) relief), affd. sub nom. *Frankl v. HTH Corp*., 650 F.3d 1334 (9th Cir. 2011), cert. denied 132 S.Ct. 1821 (2012).

[4] As set forth in detail in the attached administrative law judge's decision and our Order, these violations include warning, suspending, and discharging an employee because of his union activity, unilaterally changing terms and conditions of employment by restricting the exercise of previously agreed-upon union access practices, increasing housekeepers' assignments, ceasing contributions to the employees' 401(k) plan, failing to provide information requested by the Union that is relevant and necessary for the Union to perform its duties as exclusive bargaining representative, placing employees under surveillance while they engage in union activity, undermining the Union by telling employees that union agents are barred from the premises, threatening union agents with removal from public sidewalks because they are passing out union literature, and intimidating union representatives engaging in lawful leafleting.

election),[5] unlawfully granted promotions and wage increases during the critical period before an election,[6] unlawfully discharged members of the Union's bargaining committee, promulgated numerous overbroad rules, threatened employees with job loss, bargained in bad faith, unlawfully withdrew recognition from the employees' chosen representative, unilaterally changed various terms and conditions of employment, unlawfully imposed discipline, laid off employees and reassigned employees to other jobs without providing the Union notice and opportunity to bargain, and refused to provide the Union with requested information to enable it to fulfill its bargaining responsibilities.[7] Not only have the Respondents repeatedly acted to prevent employees from exercising their Section 7 rights and retaliated against employees when they nevertheless dared to exercise their rights, but the Respondents' violations have tended to undermine the Union as the employees' freely chosen representative. These violations have tended to weaken the Union in the eyes of its members and may well have forced it to incur additional expenses in an attempt to maintain employee support undermined by the Respondents' unlawful conduct.

Despite having been found in violation of multiple provisions of the Act, having been found to have engaged in objectionable conduct that interfered with elections on two occasions, having been subject to two Section 10(j) injunctions, and having been found in contempt of court for violating a Federal district court's injunction, the case before us demonstrates that the Respondents *still have not complied* with the remedial obligations imposed on them during our earlier encounters. Rather, they have continued to engage in unlawful activity, some of which repeatedly targeted the same employees for their protected activity and detrimentally affected collective bargaining. For example, after the Board held that the Respondents unlawfully imposed unilateral increases to housekeepers' workloads in 2007, the Respondents only briefly restored the lower workloads before again unilaterally raising them.[8] Similarly, the Respondents unlawfully disciplined, suspended, and then discharged discriminatee Rhandy Villanueva *a second time* for his protected activity, after he was reinstated pursuant to a Federal district court order of interim injunctive relief.[9] By their actions, their words,[10] and their contempt of court,[11] the Respondents have made plain their persistent indifference toward their responsibilities under the Act and their equally persistent defiance of the Board and the courts.

Notably, in affirming the district court's most recent Section 10(j) injunction, the Ninth Circuit expressly condemned the Respondents' conduct and the blatant disregard that the Respondents have demonstrated for the Board's processes:

> Two themes repeat themselves in the decade-long history of this dispute. The first is HTH's defiance of the Labor Act and its employees' statutory rights. The second is HTH's consistent losses before the agency and the courts. A skeptical adjudicator might question whether HTH has ever taken seriously its obligations under the law. We hope that we do not need to consider that question again.

*Frankl v. HTH Corp.*, 693 F.3d at 1066–1067.

In addition to the Board's standard remedies for the specific violations in this case, the judge has recommended a broad cease-and-desist order as well as a notice-reading requirement. We agree that these remedies, as far as they go, are appropriate. Under the circumstances of this case, however—where, as described above, the Respondents' unfair labor practices have been severe and pervasive and have lasted for over a decade, notwithstanding the Board's enforcement efforts—we find that a broad cease-and-desist order and a notice-reading requirement are insufficient to dissipate the likely chilling effects of the Respondents' unlawful conduct, to promote the free exercise of Section 7 rights, and to fully restore the Union to its former position.

We have broad discretion to exercise our remedial authority under Section 10(c) of the Act even when no party has taken issue with the judge's recommended remedies. *Teamsters Local 122*, 334 NLRB 1190, 1195 (2001), enfd. mem. No. 01–1513 (D.C. Cir. 2003) (consent judgment); *WestPac Electric*, 321 NLRB 1322, 1322 (1996); *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996). That statutory provision directs us, upon finding a violation, to require "such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of th[e] Act."

[5] *Pacific Beach Hotel*, 342 NLRB at 372–374.

[6] *Pacific Beach Corp.,* 344 NLRB at 1162.

[7] *HTH Corp.*, 356 NLRB No. 182, slip op. at 3–6.

[8] See id., slip op. at 5.

[9] See *Norelli v. HTH Corp.*, 699 F.Supp.2d at 1207, 1208–1209; *HTH Corp.*, 356 NLRB No. 182, slip op. at 5. Villanueva was again reinstated pursuant to the second Sec. 10(j) order. See *Frankl v. HTH*, 825 F.Supp.2d at 1018–1031, 1050.

[10] The credited testimony shows that when union representative Dave Mori notified the Respondents' regional vice president of operations, Robert Minicola, that the changes in housekeeping room assignments and the cessation of matching 401(k) contributions violated the 10(j) order imposed by United States District Court Judge Seabright on March 29, 2010, Minicola responded, "Fuck the judge. He's wrong . . . [the changes are] not illegal unless I go to jail."

[11] *Frankl v. HTH*, 832 F.Supp.2d at 1216–1217.

With these principles and goals in mind, we turn to the question of whether additional remedies, beyond those ordered by the judge, are necessary and appropriate here to effectuate the policies of the Act. We must tailor the remedies to the violations in each case. See *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333, 348 (1938); *Ishikawa Gasket America,* 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004) (Board may impose additional remedies "where required by the particular circumstances of a case"). Our remedial goal is to reaffirm to employees their Section 7 rights and to reassure them that the Respondents will respect those rights in the future. See *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007); see also *Tiidee Products, Inc.*, 196 NLRB 158, 159 (1972), enfd. sub nom. *International Union of Elec., Radio & Mach. Workers, AFL–CIO v. NLRB*, 502 F.2d 349 (D.C. Cir. 1974), cert. denied 417 U.S. 921 (1974).[12]

Here, we draw primarily on the Board's established remedial options, including some that have not been used regularly but are clearly established in precedent. We also find it appropriate, in the context of this case, to enhance some of these established remedies, while tailoring them to the circumstances here. Our analysis, as set forth below, begins with monetary remedies, including the award of litigation costs to the General Counsel and the Union, as well as certain other costs incurred by the Union as a direct result of the Respondents' unfair labor practices. We next consider the need to ensure that the Respondents' employees are fully informed of the Board's actions and the protections of the Act, addressing the notice-posting requirement and examining the reasons why the circumstances here warrant an extended posting period, notice mailing, and an additional Explanation of Rights. Following that examination, we apply the historically recognized remedy of publication in media of general circulation in the area and our standard rescission of unlawful unilateral changes. Next, we explain the need for supervisory attendance at notice readings and a narrowly-crafted visitation remedy to ensure the Respondents' compliance with the mailing, posting, and publication components of our Order over the extended period we find necessary and order today. Finally, we address whether nontraditional remedies may be required to make whole employee Rhandy Villanueva, who twice has been unlawfully discharged.

[12] While we observe that aspects of restoration and deterrence may at times be found in the same remedy (as with standard backpay awards), see *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966), we do not rely on deterrence alone to justify any particular remedial action. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940).

After consideration of the full record, as well as the nature of the violations before us, we amend the judge's recommended remedies and modify his recommended Order to conform to our findings below and to the Board's standard remedial language.[13] We also substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

1. Litigation expenses of the General Counsel and the Union

The Board has awarded litigation expenses where a respondent asserts frivolous defenses or otherwise exhibits bad faith in the conduct of litigation or actions leading to the litigation. See, e.g., *Camelot Terrace*, 357 NLRB No. 161 (2011); *Teamsters Local 122*, 334 NLRB 1190, 1193 (2001); *Alwin Mfg. Co.*, 326 NLRB 646, 647 (1998), enfd. 192 F.3d 133 (D.C. Cir. 1999); *Lake Holiday Manor*, 325 NLRB 469, 469 fn. 5 (1998); see generally *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980). We find that standard met here by, inter alia, the Respondents' conduct leading up to the instant litigation. Accordingly, we order the Respondents to reimburse the General Counsel and the Union the costs and expenses incurred in the investigation, preparation, presentation, and conduct of the present proceeding before the Board, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diems, and other reasonable costs and expenses.[14] These costs shall be determined at the compliance stage.

In ordering this remedy, we rely on the Board's inherent authority to control and maintain the integrity of its

[13] In addition to the remedies discussed below, and modifications to conform to the Board's standard remedial language, we shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, supra. We shall also order the Respondents to compensate all affected unit employees and former unit employees, including Rhandy Villanueva, for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

In addressing the Respondents' unlawful unilateral increase to housekeepers' workloads, the judge found that the Respondents "disciplined housekeepers who failed to clean their assigned number of rooms," including issuing discipline to housekeeper Marissa Julian for "failing to clean the 17 rooms assigned to her in the Beach Tower" of the hotel. However, the judge did not provide a remedy for that discipline. We do so here.

Finally, we correct several inadvertent errors made by the judge in his statement of Remedy and proposed Order.

[14] Neither the General Counsel nor the Union has requested an award of litigation costs or attorneys' fees.

own proceedings through an application of the bad-faith exception to the American Rule.[15]

The principles articulated and applied in *Camelot Terrace* and the Board's earlier decisions relying on its inherent authority are directly applicable here (and, as in *Camelot Terrace*, we need not pass on whether the Board's remedial authority under Section 10(c) of the Act encompasses the remedy here).[16] We have already detailed the Respondents' history before us. It reflects, in the Ninth Circuit's words, prolonged "defiance of the Labor Act and . . . employees' statutory rights." *Frankl v. HTH Corp.*, 693 F.3d at 1066–1067. The Respondents have failed to comply with the remedial obligations we imposed during their earlier appearances before us, even in the face of a Section 10(j) injunction. They have not only retaliated against their employees for protected conduct, but have also targeted one employee for repeated retribution. In sum, the Respondents have demonstrated bad faith in their actions giving rise to the instant litigation by their failure to remedy their earlier unfair labor practices and by their insistence on maintaining the terms that they unlawfully instituted. As a result of these actions, the Respondents should bear the financial responsibility for prolonging this case and depriving their employees of the relief from unfair labor practices to which they are entitled.[17]

Contrary to Member Miscimarra's and Member Johnson's suggestion in their separate opinions, an award of litigation expenses is not a punitive measure beyond the Board's statutory authority. The remedy, rather, is clearly compensatory in nature: it redresses only the harm caused to participants in the Board's proceedings, by the Respondents' actions. The Respondents' conduct has forced the General Counsel to divert scarce resources and time from other cases in order to once again take action against the Respondents for their repeated defiance of its obligations under the Act. Our award of litigation expenses—measured by what the General Counsel and the Union have been required to expend—helps restore the parties to where they would have been but for the Respondents' unlawful conduct. See *Phelps Dodge v. NLRB*, 313 U.S. 177, 194 (1941). At the same time, it preserves the integrity of our processes, serving as a deterrent to violations of our Order in the instant case, encouraging compliance with our Order, and protecting the rights of the parties before us. See *Kentucky River Medical Center*, 356 NLRB No. 8, slip op. at 4 (2010) ("enhanced monetary remedies also serve to deter the commission of unfair labor practices and to encourage com-

[15] See *Frontier Hotel & Casino*, 318 NLRB 857, 864 (1995), enf. denied in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997). In *Unbelievable*, the United States Court of Appeals for the District of Columbia Circuit found that the Board did not have the authority, under Sec. 10(c) of the Act, to order a respondent to pay litigation costs incurred by the charging party and the General Counsel. But the court did not address the Board's inherent power to control its own proceedings through an application of the bad-faith exception to the American Rule against awarding litigation expenses. Id. at 800 fn.* As Judge Wald stated in her partial dissent in that case, this necessary power allows an agency such as the Board "to ensure the fairness, efficiency and integrity of its processes and the appropriateness of the conduct of the parties appearing before it." Id. at 812. Judge Wald further recognized that awarding litigation expenses in cases of severe misconduct "effectuates the policies of the NLRA by directly remedying the economic injury incurred by the party." Id. at 810. For these reasons, and as recognized in our subsequent decisions, we find that the Board has the authority to award litigation costs pursuant to the bad-faith exception to the American Rule against fee-shifting based on our inherent authority to control the integrity of own proceedings. See *Camelot Terrace*, supra, slip op. at 4–6; *Lake Holiday Manor*, supra at 469 fn. 5.

In their separate opinions, our dissenting colleagues Member Miscimarra and Member Johnson, relying on the District of Columbia Circuit's decision in *Unbelievable*, supra, reject our position, but cite to no authority squarely holding that the Board lacks the power to award litigation expenses as a function of its inherent authority to preserve the integrity of its own processes. To the contrary, as we noted in *Camelot Terrace*, courts generally recognize that administrative agencies have the inherent power to protect the integrity of their administrative processes. *Camelot Terrace*, supra, slip op. at 5 (citing cases). There is no reason to believe the courts intend the Board to be treated differently. Even following its decision in *Unbelievable*, the District of Columbia Circuit found an order requiring payment of litigation expenses under the bad-faith exception to the American Rule was not "obviously ultra vires" and chose not to review the Board's remedy, although it could have done so despite the employer's failure to preserve the issue if it believed the remedy was "patently in excess of the Board's authority." See *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 fn. 13 (D.C. Cir. 1999).

[16] *Camelot Terrace*, supra, slip op. at 4 fn. 10 (Because the Board may award litigation expenses against a party who engages in bad-faith conduct based on its inherent authority to control its own proceedings, it is unnecessary to pass on whether it may alternatively do so under its Sec. 10(c) remedial authority to effectuate the policies of the Act.).

[17] We disagree with the views of Member Johnson and Member Miscimarra that the Charging Party Union is not entitled to post-complaint litigation costs because such participation on its part was "voluntary." In litigating unfair labor practices of the scope, variety, and duration of those here, the "voluntary" participation of the Charging Party, exercising its right under the Board's Rules and Regulations, in preparing, filing, and presenting the charges and assisting in their litigation, not only advances the interests of workers on whose behalf the charges have been filed, but also inherently inures to the benefit of the General Counsel in the presentation of the case. Of course, the complexity of the case (evidenced by the 16-day hearing involving myriad allegations and witnesses) was the result of the Respondents' unlawful conduct and repeated abuse of Board processes. To be sure, our award of litigation expenses is not based on the benefit conferred by the Union's participation, but on the Respondents' bad faith and conduct of this litigation. Protecting the integrity of the Board's proceedings necessarily requires compensating those parties to the proceedings who were entitled to participate and who have been harmed by the bad-faith conduct of an opposing party.

pliance with Board orders"); *NLRB v. Gissel Packing Co*., 395 U.S. 575, 612 (1969).[18]

2. Union bargaining and other expenses

The Board historically has awarded a union its reasonable bargaining expenses in cases of unusually aggravated misconduct—where the respondent's unfair labor practices have "infected the core of a bargaining process"—in order to make the union whole for its wasted resources and to restore its prior economic strength. *Frontier Hotel & Casino*, supra at 859, enfd. in relevant part sub nom. *Unbelievable, Inc.*, supra. Although not lightly imposed, bargaining expenses are appropriate where the effect of the respondent's violations cannot be eliminated by traditional remedies. See, e.g., *Teamsters Local 122*, 334 NLRB at 1195; *Harowe Servo Controls, Inc.*, 250 NLRB 958, 964 (1980). Such expenses may include, for example, reasonable salaries, travel expenses, and per diems. See *EPE, Inc.*, 273 NLRB 1375, 1379 (1985); *J. P. Stevens & Co.,* 239 NLRB 738, 773 (1978), remanded 623 F.2d 322 (4th Cir. 1980), cert. denied 449 U.S. 1077 (1981).

In our view, the Respondents' bad faith in bargaining is amply demonstrated by their intransigence, their numerous unilateral changes to the terms and conditions of employment, their ad hoc promulgation of new rules, their use of those rules to justify the termination of a union supporter, and their repeated refusal to provide the Union with presumptively relevant information. We find it appropriate to order the Respondents to reimburse the Union for the bargaining expenses it incurred as it pursued bargaining in the face of the Respondents' willful defiance of the Act. That the Union ultimately was able to achieve a collective-bargaining agreement does not defeat its entitlement. See *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 5 (2011) (awarding bargaining expenses even though some agreements were reached because the employer's bad faith reduced bargaining to a sham and wasted the union's time and resources). It must be provided with relief from the "economic consequences stemming from the [Respondents'] recalcitrance" in bargaining, otherwise the Respondents "will have succeeded in using unlawful conduct to compromise the Union's economic strength at the bargaining table." Id.

Compounding its other unlawful conduct, the Respondents also barred union officials Mori and Carmelita Labtingao from entering the facility, in violation of an access agreement with the Union.[19] This unfair labor practice, alone or in conjunction with other unlawful conduct, may have required the Union to incur additional expenses to effectively communicate with bargaining-unit employees for representational purposes or to maintain support and cohesion in the face of the Respondents' violations when, because of that misconduct, the Union was unable to fully respond to members' needs. We believe that it is appropriate to require the Respondents to reimburse the Union for those additional expenses, in light of the Respondents' pattern of willful misconduct in seeking to undermine the Union's status as certified bargaining representative of the unit employees. Like the bargaining expenses in *Teamsters Local 122*, supra at 1195, these expenses reflect the "direct causal relationship" between the Respondents' actions and the Union's losses. They may include, but are not limited to, additional costs in communicating with unit members, holding meetings offsite due to the Respondents' unlawful refusal to allow union agents on their property, and other related expenses incurred as a result of the Respondents' unlawful conduct. To guard against a speculative remedy, we will require the Union to provide detailed evidence of such expenditures at the compliance proceeding, along with evidence showing that they resulted from the Respondents' unfair labor practices and why they would not otherwise have been incurred.[20] For expenses that the Union would normally have incurred, but which were heightened because of circumstances stemming from the Respondents' conduct, we shall award the Union only the amount over and above its normal expenditures.

3. Posting and mailing of the notice, Board Decision, and Explanation of Rights

The judge ordered the Respondents to post a standard notice in their facility and to distribute it electronically if

[18] We are also unconvinced by Member Miscimarra's and Member Johnson's view that we lack the authority to award litigation expenses because Congress did not expressly authorize such a remedy when it enacted the Act and that its absence warrants the conclusion that Congress intentionally decided not to authorize fee-shifting. As explained, we rely here (as the Board has done in the past) on the Agency's inherent authority to protect the integrity of its proceedings. We note, however, that Congress did not expressly authorize notice mailing or posting, orders to unions and employers alike to engage in bargaining, granting of access rights, or indeed many of the other remedies we order as part of our mandate under Sec. 10(c) to effectuate the policies of the Act. The very language of the Act is expansive in this regard, authorizing "affirmative action *including* reinstatement of employees with or without backpay." Sec. 10(c) (emphasis added).

[19] In this respect, we disagree with our colleague Member Johnson's view that remedying the contractually agreed-to access for the Union's representatives is less warranted than a refusal to bargain. Although the Act does not require union access, it *does* require employers and unions alike to bargain in good faith and adhere to those bargained-for terms.

[20] We believe such requirements address Member Johnson's concerns in his separate opinion that expenses incurred by the Union are speculative.

the Respondents customarily communicate with their employees in that manner. These are standard remedies. *J. Picini Flooring*, 356 NLRB No. 9, slip op. at 2 (2010). We agree and attach an amended notice as Appendix A to this Decision and Order.

However, we find that an additional document—specifically, an Explanation of Rights—is warranted here in order to fully inform employees, supervisors, and managers of the employees' rights under the Act. Such a document will help to undo the likely impact of the violations on employees and help remedy the chilling effect of the Respondents' conduct. This is especially true when, as here, the rights of so many employees have been broadly suppressed for an extended period of time and in numerous ways. The Explanation of Rights, which is attached as Appendix B to this Decision and Order, will be provided by the Regional Director for Region 20. In addition to the language in our standard notice, the Explanation of Rights sets out the employees' core rights under the Act, coupled with clear general examples that are specifically relevant to the unfair labor practices found in this case.[21]

We also find that both the standard notice and the Explanation of Rights should be posted for a period sufficiently long to serve their purposes adequately in the context of this case. In prior cases, we have been asked to order notice posting beyond the standard 60 days but have declined to do so, given the facts of those cases. Here, however, we find a longer period is essential to achieve the goals of the notice-posting remedy. In our view, a 3-year period will better help mitigate what the Fifth Circuit has called the chilling "lore of the shop." *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978).

Like threats of plant closure and coercion during an election, the Respondents' unfair labor practices have been so pervasive that they likely live on in employees' memories and could continue to erode employees' willingness to exercise their rights years after the actual violations. See *ADB Utility Contractors*, 355 NLRB 1020, 1021 (2010); *California Gas Transport*, 347 NLRB 1314, 1326 (2006), enfd. 507 F.3d 847 (5th Cir. 2007). This is so even for employees who were not direct targets of the unfair labor practices but who hear of them from their coworkers and fall victim to a "legacy of coercion" that limits their own willingness to exercise their rights, even after the originally-targeted employees have departed. *Garvey Marine,* 328 NLRB 991, 996 (1999), enfd. 245 F.3d 819, 827–828 (D.C. Cir. 2001). When new hires learn of the employer's prior unlawful activity, particularly in cases involving a discriminatory discharge, they are likely to conclude that they are no less expendable than their predecessors. See, e.g., *Intersweet*, 321 NLRB 1, 19 (1996), enfd. 125 F.3d 1064, 1070 (7th Cir. 1997). As in those cases, the Respondents have sent a clear message that not only will they refuse to abide by the law, but they will take adverse action against those employees who exercise their rights. It is difficult to believe that the impression made by the Respondents' unlawful conduct over a period of years will dissipate in a matter of 60 days. Extended posting also serves as a constant reminder of the Respondents' obligation to abide by the Act, thus helping to change its workplace culture while also ensuring that supervisors and managers are aware of their own responsibilities to adhere to the law and understand what rights the Act protects.

For these reasons, and based on the facts of this case, we shall require the Respondents to post the notice and the Explanation of Rights in its Honolulu, Hawaii facility[22] for a period of 3 consecutive years in order to provide employees with the information they need to understand their rights and be assured that those rights are taken seriously and enforced.[23]

Both the notice and the Explanation of Rights shall also be given to all new employees and all new supervisors and managers, upon hire, for a period of 3 years. Both documents shall also be mailed to the homes of all current employees, supervisors, and managers, and all former employees employed by the Respondents at any time since November 24, 2009 (the date of the first unfair labor practice in this proceeding). Such mailings shall take place within 14 days from the date of the Board's Order. Notice mailing is a well-established part of the

[21] The Board's recent rule requiring all employers subject to the Act to post a notice of statutory rights has been enjoined by two Federal appellate courts. See *Chamber of Commerce v. NLRB,* 721 F.3d 152 (4th Cir. 2013); and *National Assn. of Mfgs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013). That rule did not (as we do here) require a posting solely as a remedy for unfair labor practices. Because the rule has been enjoined, the remedial Explanation of Rights is not superfluous.

[22] Pursuant to the Board's standard remedial language, the Respondents are also ordered to post both the notice and Explanation of Rights on their intranet and any other electronic message area, including email, where they generally communicate with employees.

[23] This 3-year period is particular to the facts of this case and does not foreclose the possibility of a longer or shorter duration in other cases as may be appropriate. Notably, the Equal Employment Opportunity Commission frequently includes extended postings as part of its settlement decrees, some of which require the employer to post a remedial notice for 2, 3, or 4 years, depending on the facts of the case and the nature of the allegations. See Equal Employment Opportunity Commission, "E-Race: Significant EEOC Race/Color Cases," http://www.eeoc.gov/eeoc/initiatives/e-race/caselist.cfm (last visited October 10, 2014). As this practice persuasively demonstrates, certain offenses may be so severe and pervasive, and do such damage to the employees' protected rights, that a longer posting period may be necessary to adequately remedy the harm by alerting employees as to the alleged violations and reassuring them of their legal rights.

Board's remedial repertoire when traditional posting is insufficient to dissipate the effects of the unfair labor practices. See, e.g., *Sambo's Restaurant, Inc.*, 247 NLRB 777, 778 fn. 6 (1980), enfd. 641 F.2d. 794 (9th Cir. 1981) (enforcing Board's remedies after employer failed to file motion for reconsideration to Board); *J. P. Stevens & Co., Inc.*, 157 NLRB 869, 878 (1966), enfd. 380 F.2d 292 (2d Cir. 1967), cert. denied 389 U.S. 1005 (1967). Although we order an extended posting remedy, the additional mailing is necessary on the facts of this case. As in other notice-mailing cases, the Respondents' violations were unquestionably deliberate, targeted, and egregious, designed to frustrate the exercise of Section 7 rights and undermine the Union's effectiveness. Mailings will reach individuals who would not otherwise see the posting but who were affected by the Respondents' unlawful conduct, such as the Respondents' former employees who lack access to the Respondents' facility. Through these documents, supervisors, and managers will receive additional, direct instruction as to their responsibilities under the Act. Such instruction is clearly necessary, in light of (1) their significant involvement in the Respondents' unfair labor practices, such as the unilateral increase in housekeeping work assignments, the ad hoc promulgation of new rules used to justify the discharge of Villanueva, and the removal of union agents from the facility; and (2) the culture of union animus that the Respondents facilitated and encouraged over the past decade.[24] Current and newly-hired employees, as well as supervisors and managers, will be afforded the opportunity to privately review the documents free from the Respondents' potential scrutiny for as long as necessary to understand their contents and as often as necessary to reinforce their rights in the future. Providing employees with this information creates an immediate assurance of a workplace culture in which their rights will be respected, and encourages an expectation of compliance with the Act.

The Respondents are further ordered to provide and mail a copy of our Decision and Order in this case to new and current employees, supervisors, and managers for the 3-year period in order to promote an understanding of and compliance with the Act. The Decision and Order builds on the notice and the Explanation of Rights by not only detailing the nature of the Respondents' violations, but also explaining the employees' statutory rights, the legal processes under the Act, and the ways in which employees' rights ultimately were enforced. Mailing of the Decision and Order shall take place no later than 21 days and no earlier than 14 days from the date of the Board's Order.[25] The mailing shall also include a cover letter provided by the Regional Director for Region 20, attached as Appendix C to this Decision and Order, which explains that the Decision and Order is being mailed pursuant to the Board's Order and which references the notice and the Explanation of Rights previously mailed to employees.

The Respondents shall retain a copy of the notice and the Explanation of Rights provided to each individual in their personnel records for the 3-year period, along with receipts, proofs of mailing, and documentation evidencing the date and manner of distribution.

4. General publication of notice and Explanation of Rights

We further order the Respondents to publish the notice and the Explanation of Rights in English in two local publications of broad circulation and local appeal twice a week for a period of 8 weeks. Such a publication remedy, though not routinely used, has been found appropriate in other egregious cases. See, e.g., *Fieldcrest Cannon,* 318 NLRB 470, 473 (1995), enfd. in relevant part 97 F.3d 65 (4th Cir. 1996); *Three Sisters Sportswear Co.*, 312 NLRB 853, 854 (1993), enfd. mem. 55 F.3d 684 (D.C. Cir. 1995), cert. denied 516 U.S. 1093 (1996). "[W]here the violations are flagrant and repeated, the publication order has the salutary effect of neutralizing the frustrating effects of persistent illegal activity by letting in 'a warming wind of information and, more important, reassurance.'" *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 12 (1st Cir. 1976) (quoting *J. P. Stevens Co. v. NLRB*, 417 F.2d 533, 538–540 (4th Cir. 1972)), cert. denied 429 U.S. 1039 (1977). The publications shall be chosen by the Regional Director for Region 20 and need not be limited to newspapers as long as they will achieve broad coverage of the area. In this way, the notice and the Explanation of Rights will better reach all those affected by the Respondents' unfair labor practices, particularly former employees for whom the Respondents do not have current mailing information, as well as future employees in the Honolulu hospitality industry. See *Electrical Workers Local 3 (Northern Telecom)*, 265 NLRB 213, 219 (1982), enfd. 730 F.2d 870, 880–881 (2d Cir. 1984) (citing cases); *Haddon House Food Products,*

[24] The Board has for similar reasons previously required such direct instruction of supervisors as a remedy for an employer's flagrant misconduct. See, e.g., *J. P. Stevens & Co.*, 245 NLRB 198, 199 (1979), enfd. in relevant part 638 F.2d 676 (4th Cir. 1980); *S. E. Nichols, Inc.*, 284 NLRB 556 (1987), enfd. in part 862 F.2d 952 (2d Cir. 1988), cert. denied 490 U.S. 1108 (1989).

[25] As discussed below, we will also require the Respondents to give copies of the notice and Explanation of Rights to supervisors and managers at the time of the reading.

242 NLRB 1057, 1060 (1979), enfd. in relevant part sub nom. *Teamsters Local 115 v. NLRB*, 640 F.2d 392 (D.C. Cir. 1981), cert. denied 454 U.S. 827 (1981), and cert. denied sub nom. *Haddon House Food Products, Inc. v. NLRB*, 454 U.S. 837 (1981).

5. Attendance of supervisors and managers at the notice reading

Supervisors are the direct contact points between employees and management, and it is necessary here to craft a remedy that takes into account the role supervisors have in an employer's compliance with the Act. In this case, as discussed above, the Respondents' director of housekeeping, housekeeping manager, and housekeeping supervisor were directly involved in the unilateral increase in housekeeping work assignments and/or the ad hoc promulgation of new rules used to justify the discharge of Villanueva. The assistant manager for restaurant operations was involved in the removal of union agents from the facility. It is appropriate, then, to require supervisors and managers to attend a reading of the notice and the Explanation of Rights. See *McAllister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004), enfd. mem. 156 Fed. Appx. 386 (2d Cir. 2005); *Three Sisters Sportswear Co.*, 312 NLRB at 853. Not only does this convey a message to the employees that their supervisors are just as responsible as upper management for adhering to the law, it also exposes the supervisors to information concerning their own substantive obligations under the Act. See *Domsey Trading Corp.*, 310 NLRB 777, 780 (1993), enfd. 16 F.3d 517 (2d Cir. 1994) (requiring manager who had committed unfair labor practices to be present when notice is read to employees).

We therefore amend the judge's remedy to require all employees, supervisors, and managers to attend a public reading of the notice and the Explanation of Rights.[26] The reading shall be held in the presence of a Board agent. The notice and Explanation of Rights shall be read by Regional Vice President Robert Minicola (or his successor) or, at the Respondents' option, by the Board agent in the presence of Minicola (or his successor), CEO Corine Watanabe, or President John Hayashi.[27] We will also order the Respondents to grant the Union, through the Regional Director, reasonable notice and opportunity to have a representative present when the notice and the Explanation of Rights are read to employees.[28] See *Texas Super Foods*, 303 NLRB 209, 209, 220 (1991) (adopting remedy). Translation shall be made available for any individual whose language of fluency is other than English. The Respondents are ordered to maintain sign-in sheets for supervisors and managers at the public readings, give them copies of the notice and the Explanation of Rights at the time of the reading, and maintain receipts. These documents will be made available to the Board's duly-authorized representatives for compliance purposes as set forth in this Amended Remedy and Order.

6. Rescission of unlawful unilateral changes

The standard affirmative remedy for unlawful unilateral changes to the terms and conditions of employment is immediate rescission of the offending changes to the status quo ex ante. *Goya Foods of Florida*, 356 NLRB No. 184, slip op. at 2 (2011). As found by the judge, the Respondents here unilaterally increased housekeeping assignments in both the Beach and Ocean Towers of the hotel and ceased matching 401(k) contributions. We order them to rescind these unlawful unilateral changes and to make unit employees whole for any loss of earnings and other benefits attributable to this unlawful conduct. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Additionally, having found that the Respondents violated Section 8(a)(5) and (1) by ceasing to make contributions to employees' 401(k) plans from January to May 2010, we shall order the Respondents to make such contributions, including any additional amounts due the plan in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), and to make whole the unit employees for any loss of interest they may have suffered as a result of the failure to make such pay-

[26] For purposes of this remedy, we include within the meaning of supervisors and managers all individuals who oversee bargaining unit employees in any capacity or who serve other managerial roles, not only those who qualify as statutory supervisors under the Act.

[27] In accordance with the Board's standard remedial practice, we amend the judge's remedy to allow the Respondents the option of having a Board agent read the notice to the assembled individuals in lieu of Minicola. We will, however, order Minicola to sign the attached notice because of his high position and prominent role in the Respondents' unfair labor practices.

In light of the size of the Respondents' work force and our decision to require broad attendance, we will allow the Respondents to hold several meetings during which the notice and Explanation of Rights will be read. To guard against the risk that all or most supervisors and managers will attend a single session, thereby undermining the message for employees attending another session that all levels of management appreciate and respect their rights, we shall require at least two supervisors/managers and at least one of the Respondents' three central management representatives—Watanabe, Hayashi, or Minicola—to be present at each reading. Each of these three managers must attend at least one meeting.

[28] The Union here is a representative of the unit employees under Sec. 9(a) of the Act, further justifying its presence at the reading.

ments.[29] We shall also order the Respondents to reimburse unit employees for any expenses ensuing from the Respondents' failure to make the contractually-required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra. We emphasize, however, that these remedies do not diminish any contractual rights secured by the Union in bargaining.

7. Access for union representatives

We will order the Respondents to rescind any rule or practice limiting the Union's access to its property at variance with its past practice or prior agreements with the Union and notify union agents Mori and Labtingao or their successors, both orally and in writing, that they are no longer barred and that the Respondents will not deny union representatives access at variance with past practice or the terms of the existing collective-bargaining agreement.

The violation that we remedy occurred in 2010. We take administrative notice of the fact that the Respondents and the Union reached a collective-bargaining agreement in January 2013. Therefore, so as not to disturb or diminish contractual rights secured by the Union in subsequent collective bargaining, our restoration of the access rights that were based on the parties' agreements in existence prior to the violations we find today shall be implemented only upon the request of the Union.[30]

8. Visitation

As stated above, we have ordered the Respondents to post the notice and the Explanation of Rights and mail copies of those documents, as well as the Board's Decision and Order, to all new employees, and new supervisors and managers for a period of 3 years. We deem it both necessary and appropriate to take measures to ensure that our Order is fully carried out during that period.

The Board has considered visitation provisions to ensure compliance with its Orders. See, e.g., *Hilton Inn North*, 279 NLRB 45 (1986), enfd. 817 F.2d 391 (6th Cir. 1987); *Cherokee Marine Terminal*, 287 NLRB 1080 (1988); *299 Lincoln Street,* 292 NLRB 172, 175 (1988); *El Mundo Corp.*, 301 NLRB 351 (1991). Although the Board has rejected so-called standard visitation clauses, it has granted visitation on a case-by-case basis "when the equities demonstrate a likelihood that a respondent will fail to cooperate or otherwise attempt to evade compliance" and "it appears possible that the respondent may not cooperate in providing relevant evidence unless given specific, sanction-backed directions to do so." *Cherokee Marine Terminal*, supra at 1083 fn. 14; see also *299 Lincoln Street*, supra at 175 (narrow visitation clause warranted).

As the Board did in *299 Lincoln Street* and *El Mundo Corp.*, above, we refrain from issuing a broad visitation clause like that at issue in *Cherokee Marine*, but find a narrowly-tailored one appropriate here. Under our Order, a duly-appointed Board agent may enter the Respondents' facility for a period of 3 years, at reasonable times and in a manner not to unduly interfere with the Respondents' operations, for the limited purpose of determining whether the Respondents are in compliance with our posting, distribution, and mailing requirements. The Respondents must maintain and make available for inspection proofs of mailings, receipts, and sign-in sheets as discussed in connection with the notice-reading, mailing, and in-person delivery obligations ordered herein.

In making this determination, we are mindful of the facts that make visitation especially appropriate and the specific advantages of that remedy here. See *Hilton Inn North*, supra. As indicated, visitation will help to ensure continuous compliance with our Order throughout the entire 3-year period. It will further relieve employees of the onus of a watchdog role with respect to the Respondents' compliance, a factor we find particularly important in reducing the risk of retaliation against them and in restoring their confidence in their statutory rights. To the extent that the Respondents experience management turnover or operational changes, regular monitoring by a Board agent will also help ensure compliance throughout that period.

We have tailored the clause to meet our compliance goals. First, our 3-year time limit directly corresponds with the 3-year requirements concerning posting of the notice and the Explanation of Rights. Second, the limited purpose of the visitation is clearly defined in relation to specific remedies requiring ongoing monitoring, rather than general compliance or a search for possible future violations. Third, the Order language specifically defines third parties included in its scope to cover the Respondents, their officers, agents, successors, or assigns, their employees, or their former employees having

[29] To the extent that an employee has made personal contributions to the 401(k) savings plan that have been accepted by the plan in lieu of the Respondents' delinquent contributions during the period of the delinquency, the Respondents will reimburse the employee, but the amount of such reimbursement will constitute a set-off to the amount that the Respondents otherwise owe the fund. See, e.g., *Capital Iron Works Co.*, 355 NLRB No. 138 (2010) (incorporating by reference 355 NLRB 127, 129 fn. 4 (2010)).

[30] This case did not involve a question of whether or under what circumstances the Act might permit the Union to enter the Respondents' facility in the absence of the parties' past practice or agreement.

knowledge concerning the posting and maintenance of the notice and the Explanation of Rights in the manner and for the time required. See *Cherokee Marine Terminal*, supra at 1081–1082.

9. Remedies for discriminatee Villanueva

The Respondents have twice unlawfully terminated employee Rhandy Villanueva for his protected activity. We adopt the judge's recommended remedies of reinstatement and make-whole relief for any loss of earnings and other benefits that Villanueva may have suffered as a result of the discrimination against him.[31] Reinstatement of union supporters has long been recognized as a way to vindicate employees' statutory right to organize in the workplace. See, e.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 195 (1941). It serves important—indeed, unique—statutory policies. Without reinstatement, the extended absence of discharged union supporters leaves the remaining employees without the leadership of active coworkers and demonstrates that the employer's unlawful conduct cannot be redressed.

Nevertheless, and without any intent to undermine the effectiveness of reinstatement as the typical remedy for an unlawful discharge, we believe that the facts of this case raise a serious question as to whether reinstatement adequately serves to make Villanueva whole. The hardships Villanueva faces as a result of the Respondents' unlawful conduct may continue should he accept reinstatement. In certain circumstances, a remedy of reinstatement forces employees to either return to their former workplace and face the likelihood of further hostility, retaliation, illegal discrimination, and possible loss of employment, or forego their right to reinstatement to avoid these anticipated consequences and be subjected to further economic loss. Evidence suggests that victims of unlawful employer conduct who choose reinstatement have faced considerable challenges and often do not remain long at their jobs.[32] Reinstatees who were the subject of targeted unfair labor practices are subject to considerable risk of retaliation from their employers, as well as tension with their coworkers, fears that have deterred many from accepting reinstatement when offered.[33] The record in this case suggests an even greater likelihood of such risks. The Respondents have demonstrated significant hostility toward Villanueva's continued employment. His earlier reinstatement only led to more targeted unfair labor practices by the Respondents, including harassment, retaliation, unlawful discipline and job loss. The extended litigation in this and previous cases does not bode well for an improved relationship.

Recognizing these problems, Federal employment law, as interpreted by the courts and by administrative agencies, offers the option of front pay in lieu of reinstatement in appropriate cases. This remedy is recognized under many Federal antidiscrimination statutes, including Title VII of the Civil Rights Act of 1964, which has remedial provisions modeled on our Act. See, e.g., *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843, 848–851 (2001). The Supreme Court carefully examined the nature of front pay and the statutory basis for such an award under Title VII in *Pollard*, holding that front pay is "not an element of compensatory damages" and is therefore not subject to the statutory cap on those types of damages. Id. at 848. Rather, the Court explained, "front pay is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." Id. at 846. In reaching its conclusion, the Court observed that the remedial provisions of Title VII "closely tracked the language of Section 10(c) of the National Labor Relations Act, which similarly authorized orders requiring employers to take appropriate, remedial 'affirmative action.'" Id. at 848–849 (citations omitted). Indeed, repeatedly invoking the Act, it found that the interpretation of Section 10(c) served as "guidance as to the proper meaning" of Title VII's provisions. Id. at 849. The Court's decision makes clear that an award of front pay in lieu of reinstatement is an affirmative make-whole remedy under Title VII's remedial provision—a provision that echoes the language of the Act. Id. at 853. See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419–421 (1975) (linking the make-whole purpose of Title VII's remedies to its use of the Act as a model and noting the Act's goal to make workers whole for losses suffered due to unfair labor practices).

As explained, Section 10(c) instructs us to issue an order requiring a party that engaged in an unfair labor practice to "take such affirmative action . . . as will effectuate the policies of th[e] Act." The Supreme Court has long

[31] We recognize that Villanueva likely faces additional challenges in obtaining other employment and mitigating his backpay in light of his repeat discharges. Given the particular circumstances of this case, we will look skeptically on any claim by the Respondents in compliance that Villanueva has failed to mitigate damages. Contrary to Member Miscimarra's contention, we are not prejudging any future mitigation of damages claim here. We simply note that any such claim must necessarily be weighed against the Respondents' repeated discrimination and consequent damage to Villanueva's employment prospects.

[32] See, e.g., West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. Ill. L. Rev. 1, 29–31 and fns. 138–141 (1998); Chaney, *The Reinstatement Remedy Revisited*, 32 Lab. L. J. 357, 359–361 (1981).

[33] See, e.g., Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines & Proposals*, 141 U. Pa. L. Rev. 457, 477–478 (1992); Weiler, *Promises to Keep: Securing Workers' Rights To Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1791 (1983).

recognized that our remedial power "is a broad discretionary one." *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346 (1953); *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969) (internal quotation and citation omitted). As the Court has explained, "[t]he Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies." *Phelps Dodge Corp.*, supra at 194. Rather, remedies "must be functions of the purposes to be accomplished" and must "heed 'the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment.'" *Seven-Up Bottling Co.*, supra at 346 (quoting *Phelps Dodge Corp.*, supra at 198). Each remedy should "be tailored to the unfair labor practice it is intended to redress." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984). Of course, our remedies may not be punitive. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235 (1938). We therefore "adapt [our] remedies to the needs of particular situations so that 'the victims of discrimination' may be treated fairly" in ways that best effectuate the purpose of the Act, provided they are not purely punitive.[34] *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge Corp.*, supra).

Although we emphasize that reinstatement is the preferred remedy for an unlawful discharge, the Supreme Court's decision in *Pollard* provides strong support for concluding that an award of front pay reasonably serves a make-whole purpose that falls squarely within the Board's remedial authority. The Act's remedies closely resemble those available under those statutes modeled, directly or indirectly, on the Act, such as Title VII. It is noteworthy that those statutes, like the Act, prohibit unlawful employment discrimination, including discriminatory employment terminations, and they authorize the formulation of effective remedies. And under those other statutes, as explained previously, the courts have awarded front pay where circumstances warrant such an award. In some cases, it has been found warranted when, as here, there is evidence that the reinstatement would not be readily feasible because of extreme hostility or antagonism between the parties, psychological harm resulting from the discrimination, or when the employer has demonstrated aggressive behavior towards the former employee.[35] The advisable remedy in those cases may be to allow the individual to move forward, away from the workplace, to restore his or her state ex ante to the violations. See, e.g., *Pollard*, supra at 846; *Feldman v. Philadelphia Housing Authority*, 43 F.3d 823, 831–832 (3d Cir. 1994).

Nevertheless, the Board has never awarded front pay in lieu of reinstatement to a victim of unlawful discrimination under the Act, nor has it addressed its statutory authority to do so.[36] And while this case presents circumstances that powerfully support an award of front pay—an employee has been discharged unlawfully not once, but twice, in the context of numerous other violations of the Act and instances of retaliation for union activity[37]—we have decided to defer consideration of the Board's authority to award front pay and we shall not include an award of front pay in this case.

Here, neither the General Counsel nor the Union has asked us to consider front pay as an appropriate remedy for Villanueva. Although today (as before) we have granted remedies not requested by the General Counsel or the Union, and we have devised enhanced remedies building on established remedial tools, an award of front pay would also require the Board to determine when circumstances warrant such an award, as well as the methodology of its calculation. Neither of these determinations is a simple matter, and both would need to be examined in detail and with care. There is no uniform test for when front pay may be awarded under various employment antidiscrimination statutes, nor is there a standard method for how to calculate it.[38] The critical determinations of when and how to calculate such an award are better made in the context of a future case or cases where the necessary factual record has been fully developed and there has been appropriate briefing.[39]

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[34] The Supreme Court chose in *Seven-Up Bottling Co.* to avoid the "bog of logomachy" surrounding the debate between remedial and punitive measures, finding it "more profitable to stick closely to the direction of the Act by considering what order does, as this does, and what order does not, bear appropriate relation to the policies of the Act." Supra at 348.

[35] See, e.g., *Donlin v. Philips Lighting Co.*, 581 F.3d 73, 86 (3d Cir. 2009); *Meacham v. Knolls Atomic Power Laboratory*, 381 F.3d 56, 79 (2d Cir. 2004), vacated on other grounds sub nom. *KAPL, Inc. v. Meacham*, 544 U.S. 957 (2005); *Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1176–1177 (10th Cir. 2003); *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1066 (8th Cir. 1988); *Spulak v. K-Mart Corp.*, 894 F.2d 1150, 1157–1158 (10th Cir. 1990); *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 729 (2d Cir. 1984).

[36] We take notice of the fact that front pay is currently being included in Board settlements at the election of the parties. See Memorandum GC 13–02 (January 9, 2013).

[37] These circumstances might be balanced against the facts that Villanueva is represented by the Union and that the Union has finally achieved a collective-bargaining agreement.

[38] Given the age and complexity of this case, it is particularly important to avoid the further delay inherent in severing the issue of front pay and inviting either additional briefing or additional proceedings to consider the propriety of a front pay award here.

[39] We reject Member Miscimarra's assertion that the Board is so clearly prohibited from awarding front pay that we err in even contemplating it as a possibly viable remedy after due consideration in a future case. Our colleague's arguments are, at best, premature. As indicated above, we readily recognize the primacy of reinstatement, but we also

ORDER

The National Labor Relations Board orders that the Respondents, HTH Corporation, Pacific Beach Corporation and Koa Management, a single employer, d/b/a Pacific Beach Hotel, Honolulu, Hawaii, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Union, International Longshore and Warehouse Union, Local 142, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time, regular part-time, and regular on-call concierge, concierge II, concierge II night auditor, guest service agent I, guest service II, room control clerk, bell help, bell sergeant, door attendant, head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper IB, housekeeper II, housekeeper III, laundry attendant I, seamstress, bushelp, hosthelp, waithelp, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet foodrunner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data processing clerk, senior cost control clerk, food and beverage cashier, network support specialist, diver level I, diver level II, diver level III, diver level IV, PBX operator, lead operator, maintenance 2nd, maintenance 1st, mechanic foreman, assistant/general maintenance, maintenance trainee, senior maintenance trainee, maintenance utility, assistant gardener, assistant head gardener and gardener employed by the Employer at the Pacific Beach Hotel, located at 2490 Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marcom (sic), director of revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha Coffee Shop Manager, income auditor manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

(b) Unilaterally changing the terms and conditions of employment of their unit employees during the course of collective bargaining without the parties having reached a lawful impasse, or at any time without first notifying the Union and giving it an opportunity to bargain, including but not limited to restricting the exercise of previously-existing access rights of union agents to the hotel property, increasing housekeeping assignments in both the Beach and the Ocean Towers, and the cessation of matching 401(k) contributions.

(c) Refusing to bargain in good faith with the Union by failing and refusing to furnish it with information the Union has requested that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondents' unit employees, including but not limited to 401(k) plans and employees who participated in the plans, grievances and discipline, and related documents, work schedules and

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recognize that certain factors may limit its effectiveness and cause wronged employees to waive reinstatement, thereby depriving them of any meaningful remedy, while rewarding particularly hostile employer conduct. See, e.g., Summers, *Effective Remedies For Employment Rights: Preliminary Guidelines and Proposals*, supra, 141 U. Pa. L. Rev. at 477; West, *The Case Against Reinstatement In Wrongful Discharge*, supra, 1988 U. Ill. L. Rev. at 30–31, fns. 144–150; Weiler, *Promises to Keep: Securing Workers' Rights To Self-Organization Under the National Labor Relations Act*, supra, 96 Harv. L. Rev. at 1795. See also Office of the General Counsel, Memorandum GC 10-07, p. 1 (Sept. 30, 2010) ("with the passage of time, the discharged employees are likely to be unavailable for, or no longer desire, reinstatement when ordered by the Board"). Indeed, statistics show that most discriminatees work for the employers who initially discriminated against them for only a short time following their reinstatement. See Chaney, *The Reinstatement Remedy Revisited*, 32 Lab. L. J. at 359–361 (approximately 87 percent of reinstated employees left their offending employers within less than 1 year, and 74 percent of those cited unfair treatment as the reason for their departure); West, supra at 29–31, fns. 138–141 (1988) (30 percent of reinstated employees in a 1962-1964 study were working at their employer two years after reinstatement; 83 percent of reinstated employees in a 1971–1972 study left within 1 year after reinstatement and only 11 percent remained after the end of 2 years). In light of these concerns, the broad language of the statute, and our obligation to craft appropriate remedies tailored to the violations found, we find that a discussion about the possibility of front pay is entirely appropriate.

assignments, awards, benefits, financial data, and other terms and conditions of employment.

(d) Warning, suspending, or discharging employees, including but not limited to Rhandy Villanueva, for supporting the Union, or any other labor organization, or because they engage in protected concerted activities.

(e) Placing employees under surveillance while they engage in union activities or other protected concerted activities.

(f) Denying union representatives access to the Respondents' facility at variance with past practice or the terms of collective-bargaining agreements.

(g) Undermining the Union by telling employees that union agents are barred from entering the facility.

(h) Threatening union agents with removal from the public sidewalk for passing out union literature or other protected concerted activity.

(i) Intimidating union agents regarding lawful leafleting.

(j) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, publish in two publications of general local interest and circulation copies of the attached notice, signed by the Respondents' regional vice president of operations, Robert Minicola, or his successor, and the Explanation of Rights. Such notice and Explanation of Rights shall be published twice weekly for a period of 8 weeks. The publications shall be determined by the Regional Director for Region 20, and need not be limited to newspapers so long as they will achieve broad coverage of the area.

(b) Within 14 days from the date of this Order, mail a copy of the attached notice and the Explanation of Rights to the homes of all current employees, supervisors, and managers, and all former employees employed by the Respondents at any time since November 24, 2009. The Respondents shall maintain proofs of mailings as set forth in the Amended Remedy section of this Decision.

(c) No later than 21 days and no earlier than 14 days from the date of this Order, mail a copy of this Decision and Order to all current employees, supervisors, and managers, and all former employees employed by the Respondents at any time since November 24, 2009; and within 7 days from the date of hiring, mail a copy of this Decision and Order to all newly hired employees, supervisors, and managers. Mailings shall be sent to new employees for a period of 3 consecutive years from the date of this Order. The mailing shall include a copy of a cover letter, provided by the Regional Director for Region 20 and attached to this Decision and Order as Appendix C, explaining that the Decision and Order are being mailed pursuant to the Board's Order and referencing the notice and the Explanation of Rights previously mailed. The Respondents shall maintain proofs of mailings as set forth in the Amended Remedy section of this Decision.

(d) For a period of 3 consecutive years from the date of this Order, provide a copy of the notice and the Explanation of Rights on forms provided by the Regional Director for Region 20 to all new employees, supervisors, and managers within 7 days from the date on which their employment by the Respondents commences. The Respondents shall retain a copy of the notice and the Explanation of Rights provided to each individual in their records for the 3-year period, along with receipts and documentation evidencing the date and manner of their distribution as set forth in the Amended Remedy section of this Decision.

(e) Within 14 days after service by the Region, post at its hotel in Honolulu, Hawaii copies of the attached notice and the Explanation of Rights, marked "Appendix A" and "Appendix B."[40] Copies of the notice and the Explanation of Rights, on forms provided by the Regional Director for Region 20, shall be posted and maintained for a period of 3 consecutive years in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, both the notice and the Explanation of Rights shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. The notice and the Explanation of Rights shall not be altered, defaced, or covered by any other material. If those documents are so altered, defaced, or covered, the Respondents shall promptly notify the Region and obtain new copies at their own expense.

(f) Within 14 days from the date of this Order, convene meetings at their Honolulu, Hawaii hotel during working time, scheduled to ensure the widest possible attendance, at which the attached notice and Explanation of Rights are to be read to all employees, supervisors, and managers. The meetings shall be held in the presence of a Board agent, and the notice and Explanation of Rights shall be read by Robert Minicola (or his successor) or, at the Respondents' option, by the Board agent in the presence of Minicola (or his successor), Corine Watanabe, or

[40] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

John Hayashi. At least one of these three individuals (Minicola, Watanabe, Hayashi, or their successors) must be in attendance at each reading, and each of the three individuals must attend at least one reading. At least two supervisors/managers must be present at each reading. The Respondents shall maintain sign-in sheets for supervisors and managers at the readings, give them copies of the notice and the Explanation of Rights at the time of the reading, and maintain receipts as set forth in the Amended Remedy section of this Decision. The Respondents shall also afford the Union, through the Regional Director, reasonable notice and opportunity to have a representative present when the notice and the Explanation of Rights are read to employees. Translation shall be made available for any individual whose language of fluency is other than English. The meetings shall be for the above-stated purpose only. Individuals unable to attend the meeting to which they have been assigned will be able to attend a subsequent meeting during which the same reading shall take place under the same conditions. The Respondents shall allow all employees to attend these meetings without penalty or adverse employment consequences, either financial or otherwise.

(g) Give notice to and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit before implementing any changes to terms and conditions of employment that are not contained in the collective-bargaining agreement, including but not limited to access to the Respondents' property by union agents, payments to employees' 401(k) plans, and changed or increased room assignments for housekeeping employees. For any term and condition of employment contained in the collective-bargaining agreement, obtain the Union's consent before implementing changes to any such term.

(h) Rescind any unilateral change limiting the Union's access to hotel property that is at variance with past practice or the parties' agreements, and notify union agents Mori and Labtingao, both orally and in writing, that they are no longer barred, and that the Respondents will not deny union representatives access at variance with past practice or the parties' agreements. Nothing in the Order shall diminish or enlarge the contractual rights secured by the Union in subsequent negotiations with the Respondents.

(i) Within 14 days from the date of this Order, rescind the unlawful unilateral changes in the terms and conditions of employment found in the judge's decision as amended in this Decision, including but not limited to the increase in housekeeping assignments in both the Beach and the Ocean Towers and the cessation of matching 401(k) contributions. Nothing in this Order shall diminish or enlarge any contractual rights secured by the Union in subsequent negotiations with the Respondents.

(j) Make Rhandy Villanueva whole for any loss of earnings and other benefits suffered as a result of the Respondents' discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this Decision.

(k) Make all affected unit employees, including Marissa Julian, and former unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondents' unlawful unilateral change in housekeeping room assignments, in the manner set forth in the Amended Remedy section of this Decision.

(l) Compensate all affected unit employees and former unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each unit employee.

(m) Reimburse all affected unit employees and former unit employees for matching contributions to their 401(k) plans for the period January 1, 2010, to May 1, 2010, in the manner set forth in the Amended Remedy section of this Decision.

(n) Within 14 days from the date of this Order, offer Rhandy Villanueva full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(o) Furnish to the Union in a timely manner all information requested by the Union in November 2009 and in April, May, June, July, and August 2010, including but not limited to full data regarding the hotel's financial state as set forth in the judge's decision.

(p) Pay to the General Counsel the costs and expenses incurred by him in the investigation, preparation, presentation, and conduct of this proceeding before the Board, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diems, and other reasonable costs and expenses, in an amount to be determined at the compliance stage of this proceeding.

(q) Pay to the Union the costs and expenses incurred by it in the investigation, preparation, presentation, and conduct of this proceeding before the Board, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diems, and other reasonable costs and expenses, in an amount to be determined at the compliance stage of this proceeding.

(r) Reimburse the Union for its costs and expenses incurred in collective bargaining for all negotiations stemming from the violations found in this Decision, including, for example, reasonable salaries, travel expenses, and per diems, in the manner set forth in the Amended Remedy section of this Decision.

(s) Pay to the Union the nonlitigation, nonbargaining expenses resulting from the Respondents' unfair labor practices in the manner set forth in the Amended Remedy section of this Decision, in an amount to be determined at the compliance stage of this proceeding. Such expenses may include, but are not limited to, additional costs in communicating with unit members, holding meetings off site due to the Respondents' unlawful refusal to allow union agents on their property, and maintaining cohesion in the face of the Respondents' violations when, because of that misconduct, the Union was unable to fully respond to members' needs. The Union is required to provide evidence of such expenditures along with evidence showing that they resulted from the Respondents' unfair labor practices over and above its normal expenditures.

(t) Within 14 days from the date of this Order, remove from their files any references to the unlawful written warning, suspension, and termination imposed on Rhandy Villanueva, and within 3 days thereafter, notify him in writing that this has been done and that the warning, suspension, and termination will not be used against him in any way.

(u) Within 14 days from the date of this Order, remove from their files any references to the unlawful discipline imposed on Marissa Julian and any other employees in connection with the Respondents' unlawful increase in housekeeping assignments, and within 3 days thereafter, notify them in writing that this has been done and that the discipline will not be used against them in any way.

(v) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable places designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(w) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of Corine Watanabe, John Hayashi, and Robert Minicola, or their successors, on a form provided by the Region, attesting to the steps that the Respondents have taken to comply with this Order.

(x) For a 3-year period following the date of this Order, allow the Board or any of its duly-authorized representatives to obtain at any time, in both oral and documentary forms, discovery and evidence from the Respondents, their officers, agents, successors or assigns, and their employees or former employees having knowledge concerning the posting and maintenance of the notice and the Explanation of Rights as well as the mailing of those documents and the Board's Decision and Order to all new employees and new supervisors and managers as set forth in the Amended Remedy section of this Decision in the manner and for the time required. Such visitation shall be conducted under the supervision of the Regional Director for Region 20, and shall be narrowly limited to assessing and ensuring the Respondents' compliance with this Order as described in the Amended Remedy. The Respondents shall make available for inspection proofs of mailings, receipts, and sign-in sheets as set forth in the Amended Remedy.

Dated, Washington, D.C. October 24, 2014

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| Mark Gaston Pearce, | Chairman |
| Kent Y. Hirozawa, | Member |
| Nancy Schiffer, | Member |

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

I concur regarding some remedies imposed by my colleagues in this case to address Respondents' violations of the Act,[1] but I dissent regarding other remedies, especial-

[1] I also concur with my colleagues' findings of liability in this case. However, regarding Respondents' unilateral curtailment of matching contributions to employee 401(k) accounts from January 1 to May 1, 2010, in violation of Sec. 8(a)(5) and (1) of the Act, I do not rely on *RBE Electronics of S.D.*, 320 NLRB 80 (1995), and *Bottom Line Enterprises,* 302 NLRB 373 (1991), enfd. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994), which the judge cited. Regarding the finding that employee Rhandy Villanueva's warning, suspension, and discharge were unlawful, I disagree with the majority's statement that the General Counsel need not establish a "nexus" between decisions and unlawful motivation under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). As expressed in my concurring opinion in *Starbucks Corp*., 360 NLRB No. 134, slip op. at 6 fn. 1 (2014), generalized antiunion animus does not satisfy the General Counsel's initial burden under *Wright Line* absent evidence that the challenged adverse action was motivated by antiunion animus. As stated in *Wright Line* itself, the

ly (i) the requirement of "fee-shifting" (requiring Respondents to pay the attorneys' fees incurred by the General Counsel and also by the Union), and (ii) the suggestion that the Board may commence awarding "front pay in lieu of reinstatement" (the payment of future wages without any requirement that the employee work or accept reinstatement). For reasons specific to the Act and its legislative history, I believe the Board lacks authority to impose these remedies. And putting aside limits on the Board's authority, these remedies are ill-advised because their potential availability will fundamentally change the careful balancing of interests reflected in our statute.

The Board is unanimous about one thing: this case involves circumstances that render appropriate many of the remedies described by my colleagues.[2] As reflected in the record before us, the company has exhibited contempt, literally and figuratively, for its obligation to comply with Federal law, which includes the National Labor Relations Act. As my colleagues rightfully state, "Respondents have made plain their persistent indifference toward their responsibilities under the Act and their equally persistent defiance of the Board and the courts." The Respondents' multiple violations of the Act involve two discharge decisions found to be unlawful, plus other unlawful actions. These violations span more than 10 years, including four separate cases before the Board, and numerous related court proceedings. The record includes credited testimony that a company vice president—upon being informed that Respondents were violating a Federal court order issued pursuant to Section 10(j) of the Act—stated, "Fuck the judge. He's wrong," and added that actions are "not illegal unless I go to jail."

The National Labor Relations Act provides that, if the Board finds that any party "has engaged in or is engaging in any such unfair labor practice," the Board shall devise an order "requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act."[3] Not only can the Board devise remedies consistent with its authority under the Act, the Board has the authority in appropriate cases to seek interim injunctive relief under Section 10(j).[4] Moreover, the Board's orders are subject to enforcement in the courts. When any party violates a court's enforcement of an NLRB order, that violation is subject to potential civil and criminal contempt proceedings and penalties, including potential fines and imprisonment.[5]

I embrace the remedies and enforcement measures available to the Board and courts under the Act, including aggressive resort to civil and criminal contempt proceedings in appropriate cases. When the Board encounters a recidivist offender that has violated repeated Board and court orders, and where the violations span many years, the Board has the responsibility to carefully evaluate and devise remedies that in these particular circumstances will "effectuate the policies of [the] Act."[6]

Accordingly, as described below, I agree with many remedies the Board finds appropriate to impose in cases like this one. The Board in a narrow range of cases has awarded compensation for the union's reasonable bargaining expenses in cases involving unusually aggravated misconduct (see majority opinion, part 2).[7] Circumstances like those presented here can warrant the posting and mailing to employees of the Board's remedial notice

General Counsel must make "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB at 1089 (emphasis added).

[2] It is well established that the Board has broad remedial authority under Sec. 10 of the Act, although the Board's remedial authority is not unlimited. See discussion in part A ("Fee-Shifting") below.

[3] Sec. 10(c). Sec. 10(a) also states that "[t]he Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce."

[4] Sec. 10(l) similarly requires the Board to seek injunctive relief regarding unlawful secondary picketing and related activity.

[5] Sec. 10(e) provides for the Board to secure court orders enforcing Board decisions, and noncompliance is similarly subject to potential civil and criminal contempt proceedings punishable by fines, imprisonment, or both. See, e.g., *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 270 (1940) (describing the Board's authority "to ask the court to punish the violation of its decree [enforcing a Board order] as a contempt"); In re *Winn-Dixie Stores, Inc*., 386 F.2d 309 (5th Cir. 1967) (criminal contempt proceeding).

[6] Sec. 10(c).

[7] I agree with my colleagues that the award of bargaining expenses, though appropriate in a narrow range of cases, is "not lightly imposed." Examples include *EPE, Inc.*, 273 NLRB 1375, 1379 (1985); *J. P. Stevens & Co.,* 239 NLRB 738, 773 (1978), remanded 623 F.2d 322 (4th Cir. 1980), cert. denied 449 U.S. 1077 (1981); *Harowe Servo Controls, Inc.*, 250 NLRB 958, 964 (1980); *Teamsters Local 122*, 334 NLRB 1190, 1195 (2001), enfd. mem. No. 01–1513 (D.C. Cir. 2003); *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997). Cf. *Camelot Terrace*, 357 NLRB No. 161, slip op. at 12 fn. 9 (2011) (Member Hayes, dissenting in part) ("I join my colleagues in finding that the Union should be reimbursed for its negotiation expenses due to the Respondent's failure and refusal to bargain in good faith, a remedy long sanctioned by both the Board and the courts.").

Although I agree an award of bargaining expenses is appropriate here, I dissent from my colleagues' award of "costs" related to the exclusion of union representatives Mori and Labtingao from the premises. We have found that the exclusion of Mori and Labtingao was an unlawful unilateral change in the parties' practice. However, there is no reason that the standard remedy of restoring the status quo, if the Union so requests, and ordering the Respondents to cease and desist engaging in this unlawful conduct is insufficient to remedy this violation. This award of costs is similar to the type of fee-shifting that I believe exceeds the Board's authority for the reasons expressed in part A of this opinion below.

and decision, together with an Explanation of Rights particularized to the types of violations presented here (id., part 3).[8] Consistent with other cases involving extreme and recurring unlawful conduct, we have the authority (a) to require publication of certain documents in local newspapers or other periodicals (id., part 4); (b) to require the reading of documents by a designated management representative in the presence of a Board agent and a representative of the certified union (id., part 5);[9] (c) to impose the standard remedy of rescinding unlawful unilateral changes (id., part 6);[10] (d) to apply our traditional prohibition against unlawful discrimination that unilaterally eliminates a preexisting right—if afforded by existing contract provisions or past practice—giving access to union representatives consistent with the applicable contract provisions or past practice (id., part 7);[11] (e) to impose the existing remedy, though rarely utilized, providing for reasonable periodic Board access solely to inspect and confirm compliance with the Board's order (id., part 8);[12] and (f) to utilize the standard remedies of reinstatement, backpay and lost benefits for individuals whose discharge(s) were proven to result from unlawful discrimination (id., part 9).[13]

However, as to these and other remedies described by my colleagues, I believe several points warrant elaboration.

First, the Board regards this as an extremely unusual case. Putting aside the standard remedies of rescission, reinstatement, back wages, and lost benefits, the other remedies described above are truly extraordinary measures. They address misconduct by a party that has been adjudicated to be in contempt of court, whose objectionable actions interfered with multiple elections, where two Section 10(j) injunctions have been issued, where multiple discharges violated Section 8(a)(3), and where the Respondents exhibited open contempt for the Act's requirements and for Board and court orders. And nearly all of the foregoing remedies have been utilized by the Board previously in other cases involving outrageous

[8] My colleagues' Explanation of Rights is not intended to function as a blanket notice requirement regarding generalized rights and obligations under the Act. Also, I note that the requirement that the Respondents provide copies of the notice and Explanation of Rights to newly hired employees for a 3-year period (which, like my colleagues, I find reasonable in this case) does not otherwise restrict the employer's right to engage in other communications and orientation sessions as the employer deems appropriate. In this regard, however, it is well established that employers are prohibited from devising their own parallel notices or communications that overtly negate or disclaim compliance with Board orders and posted notices. See NLRB Casehandling Manual, Part 3, Sec. 10518.6 (discussing the impermissibility of "side notices" that minimize or negate a party's remedial obligations); cf. *Deister Concentrator Co*., 253 NLRB 358, 359 fn. 5 (1980).

I dissent from my colleagues' requirement that the Respondents mail the Board's Order, decision, notice and Explanation of Rights to their current managers and supervisors (and to mail or distribute the same materials to those individuals hired in the future for a 3-year period). It is well established that, as a matter of law, managers and supervisors are not members of any bargaining unit (see, e.g., *NLRB v. Yeshiva University*, 444 U.S. 672, 681–682 (1980)). Because of the required 3-year posting and mailing of the notice and expanded Explanation of Rights for bargaining unit employees, it is likely that the Employer—even if not required—would also distribute these documents to managers and supervisors. The required posting of these documents will also make managers and supervisors aware of them. However, I believe it is inappropriate for the Board to require the mailing and distribution of these documents to nonunit employees.

[9] See, e.g., *McCallister Towing & Transportation Co*., 341 NLRB 394, 400 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005); *U.S. Services Industries*, 319 NLRB 231, 232 (1995), enfd. mem. 107 F.3d 923 (D.C. Cir. 1997). I agree with my colleagues that the reading requirement can be satisfied, at Respondents' option, by having the Board agent do the reading in the presence of the designated representatives.

[10] See, e.g., *California Pacific Medical Center v. NLRB*, 87 F.3d 304, 311 (9th Cir. 1996) (stating that restoration of the status quo ante is the usual remedy in unilateral change cases).

[11] See, e.g., *Dow Jones & Co.*, 318 NLRB 574, 575–577 (1995), affd. mem. 100 F.3d 950 (4th Cir. 1996). My colleagues restate this traditional prohibition as a requirement that Respondents "rescind any rule or practice limiting the Union's access to its property at variance with its past practice or prior agreements with the Union and notify union agents . . . , both orally and in writing, that they are no longer barred and that the Respondents will not deny union representatives access at variance with past practice or the terms of the existing collective-bargaining agreement." This requirement is essentially the same as the Board's standard cease-and-desist order in cases where union representatives previously were afforded a right of access to the workplace for union business, and where the employer unilaterally denied access based on antiunion discrimination or in retaliation for protected union activities. Id.

[12] Sec. 10(e) of the Act authorizes the Board to require a violator "to make reports from time to time showing the extent to which it has complied with the [Board's] order." As noted in the majority opinion, any future access afforded to Board representatives shall be "at reasonable times and in a manner not to unduly interfere with the Respondents' operations, for the limited purpose of determining whether the Respondents are in compliance with our posting, distribution, and mailing requirements." The facts in the instant case, consistent with other decisions where a similar remedy has been ordered, make it reasonable to conclude that the Respondents "will fail to cooperate or [will] otherwise attempt to evade compliance," and "may not cooperate in providing relevant evidence unless given specific, sanction-backed directions to do so." *Cherokee Marine Terminal*, supra at 1083 fn. 14.

[13] Although the standard remedy of backpay is appropriate for Villanueva's unlawful discharge, I dissent from my colleagues' pronouncement that "we will look skeptically on any claim by the Respondents in compliance that Villanueva has failed to mitigate damages." Board and court cases provide that backpay awards are subject to a duty to exercise reasonable diligence in mitigating damages by seeking interim employment. *American Bottling Co.*, 116 NLRB 1303 (1956); *NLRB v. F.E. Hazard Ltd.*, 959 F.2d 407 (2d Cir. 1992). Any future claims about whether Villanueva exercised reasonable diligence in mitigating damages would need to be based on an evidentiary record, which cannot reasonably be prejudged in advance. Sec. 10(c) (requiring Board findings to be based on the "preponderance of the testimony"); Sec. 10(e) (providing for court enforcement of Board findings "if supported by substantial evidence on the record considered as a whole").

or recidivist violations. We are a nation of laws, and parties must be responsible for conduct that fails to conform to those laws. The Board should require the same accountability regarding the statute we have responsibility to enforce.

Second, consistent with the structure of the Act and the neutral role played by the Board, extraordinary remedies like those described above may be appropriately imposed against *any* party, whether it be an employer or union,[14] that violates Board and court orders over a period of many years.

Third, any party's noncompliance with court-enforced Board orders is subject, as noted previously, to civil and criminal contempt proceedings.[15] I support the aggressive pursuit of contempt proceedings when a party refuses to comply with Board orders that have been enforced. These proceedings are clearly within the authority of the Board and the courts, and such proceedings obviously afford due process to the parties.[16] However, we should not substitute an enhancement of remedies for our failure, in the first instance, to pursue contempt proceedings that are justified by a party's noncompliance with court-enforced Board Orders.

Finally, and most importantly, I part company with my colleagues regarding two remedies: the award of attorneys' fees to the General Counsel and the Union, and the award of front pay in lieu of reinstatement (which can be more accurately called "future pay").[17] These remedies were not sought in the instant case, they have not been the subject of briefing, and I believe they are clearly outside the Board's remedial authority under the Act. Fee-shifting and front pay in lieu of reinstatement—if regularly awarded by the Board—would substantially alter the character of NLRB litigation, in addition to disrupting the "balancing [of] competing interests of labor and management" which is the province of Congress and not the Board. *American Ship Building Co. v. NLRB,* 380 U.S. 300, 316 (1965) (the Board does not have "general authority to define national labor policy by balancing the competing interests of labor and management").[18] Different considerations highlight the inappropriateness of these remedies, and I address each of them in turn below.

### *A. Fee-Shifting*

The scope of any statute must start with an examination of its plain language. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *Bell Atlantic Telephone Cos. v. FCC,* 131 F.3d 1044, 1047 (D.C. Cir. 1997). The NLRA provides that the Board has the power to "prevent any person from engaging in any unfair labor

[14] See, e.g., Sec. 10(c) ("[W]here an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him").

[15] See fn. 5 supra.

[16] Respondents in contempt actions obviously have notice and the opportunity to defend against the contempt proceeding. Additionally, they usually have had the prior opportunity to defend against the court of appeals' enforcement of the Board Order, in addition to the opportunity before the Board to defend against the underlying alleged violations of the Act.

[17] The term "front pay" causes confusion because it has multiple meanings. My colleagues argue in favor of "front pay in lieu of reinstatement," which contemplates the Board will award employees *future wages* without any requirement that they accept reinstatement or perform other work. My colleagues acknowledge this type of front pay (future pay) has never been awarded in the Board's long history. However, as the Supreme Court has described in *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001), some courts in Title VII cases have also used the term "front pay" to describe the Board's *traditional "backpay" remedy* conditioned on, and limited by, the employer's offer of reinstatement. This conventional "backpay" remedy was regarded as "front pay" merely because most claimants are reinstated only after parties receive the judgment requiring reinstatement, so a small portion of this traditional "backpay" relates to the period after judgment is entered. For a further explanation of this distinction, see the discussion of *Pollard* in the text accompanying notes 56–67 below.

Under the Board's traditional approach, reinstatement supplemented with backpay and benefits has been the standard remedy for an unlawful discharge, except in those cases where an intervening event *cuts short* the backpay period and eliminates the reinstatement obligation. This would occur, for example, if the record reveals that the employee was unlawfully discharged from a position that the employer proves was eliminated for lawful reasons (e.g., in the event of a complete cessation of business for bankruptcy or other business reasons). See, e.g., *December 12, Inc.*, 282 NLRB 475 (1986), enfd. mem. 838 F.2d 474 (9th Cir. 1988). Similarly, the backpay period might be shortened (or backpay liability may be subject to an offset) based on evidence that an employee refused the employer's unconditional offer of reinstatement (see, e.g., *Denson Electric Co*., 133 NLRB 122, 123–124 (1961)) or otherwise failed to exercise reasonable diligence in mitigating damages (see, e.g., *Mastro Plastics*, 136 NLRB 1342, 1346–1347 (1962), enfd. in relevant part 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966); *Painters Local 419 (Spoon Tile Co.)*, 117 NLRB 1596, 1598 fn. 7 (1957) (citing *Laister-Kauffman Aircraft Corporation,* 63 NLRB 1367 (1945)), enfd. sub nom. *NLRB v. Brotherhood of Painters*, 242 F.2d 477 (10th Cir. 1957)). In all cases involving the Board's traditional approach, however, backpay and benefits would cease as of the date the employer *offered* reinstatement (regardless of whether or not the employee accepted reinstatement). By comparison, my colleagues suggest the Board could require—in addition to backward-looking wages and benefits—a payment equivalent to *future* wages and benefits *without* any reinstatement and the future performance of work by the employee (and, presumably, without regard to whether the employee found future employment with a different employer).

[18] See also *International Longshore Assoc. v. Allied International, Inc.*, 456 U.S. 212, 226–227 (1982) ("The labor laws reflect a careful balancing of interests."); *NLRB v. Brown*, 380 U.S. 278, 291–292 (1965) (stating that, regarding the "proper balance to be struck between conflicting interests," deference to the Board "cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress"). Cf. *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 617–618 (1980) (Blackmun, J., concurring) (referring to "Congress' striking of the delicate balance" regarding the right to be free from "coerced participation in industrial strife").

practice" (Sec. 10(a)). And if a violation is proven based upon "the preponderance of the testimony," the Act is very specific regarding what the Board may do:

> [T]he Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and *to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act.*

Sec. 10(c) (emphasis added). Regarding the Board's remedial authority, Congress included additional specific requirements and restrictions in the Act:

- As reflected in the above language, the Act indicates that the remedy of "backpay" is intended *only to supplement* "reinstatement of employees." Id. This notion is reinforced by Section 10(c)'s language indicating who should be responsible for backpay. Here, the Act states: "*[W]here an order directs reinstatement* of an employee, *backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him*." Id. [emphasis added].
- Section 10(c) sets forth a further requirement added as a result of the Taft-Hartley amendments in 1947 regarding the remedy of "reinstatement." Here, the Act states: "No order of the Board shall require the *reinstatement* of any individual as an employee who has been suspended or discharged, *or the payment to him of any backpay*, if such individual *was suspended or discharged for cause*." Id. [emphasis added].
- Section 10(c) also provides for a reporting requirement, stating that the Board's remedial order "may further require such person [found to have violated the Act] to make reports from time to time showing the extent to which it has complied with the order." Id.

The Supreme Court has also been specific about what the Board may *not* do when the Board concludes that a party has violated the Act. The Board's remedial authority, though broad, is strictly limited to measures that are "remedial," not punitive. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940) (citing *Consolidated Edison Co. v. NLRB,* 305 U. S. 197, 235–236 (1938)); *NLRB v. Pennsylvania Greyhound Lines,* 303 U. S. 261, 267–268 (1938). The Board is *not* "free to set up any system of penalties which it would deem adequate" to "have the effect of deterring persons from violating the Act." *Republic Steel*, 311 U.S. at 12. The Board's authority to devise remedies "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer *any penalty it may choose* because he is engaged in unfair labor practices, *even though the Board be of the opinion that the policies of the Act might be effectuated by such an order*." *Consolidated Edison*, 305 U.S. at 235–236 (emphasis added). As the Supreme Court stated in *Republic Steel*: "*We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures*, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act." 311 U.S. at 11 (emphasis added).

The Supreme Court has held that "the circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine," *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and "a court may award attorney's fees only when expressly so authorized by the legislature," *Summit Valley Industries, Inc. v. Carpenters*, 456 U.S. 717, 726 (1982).

It would be incongruous to suggest that the Board as an agency, not a court, has greater authority to require fee-shifting without congressional authorization than suggested by the Supreme Court in *Alyeska* and *Summit Valley*. However, a detailed examination of this question has been rendered unnecessary because the D.C. Circuit in *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 806 (D.C. Cir. 1997), squarely held that the Board cannot impose fee-shifting as a remedy for unfair labor practices. See also *Camelot Terrace*, 357 NLRB No. 161, slip op. at 11 (Member Hayes, dissenting) ("[T]he Board lacks the authority under Section 10(c) to impose a fee-shifting order."). The D.C. Circuit in *Unbelievable, Inc*. indicates that (i) "the presumption against fee-shifting does apply to the NLRA" (118 F.3d at 802), (ii) "congressional silence in a particular statute [is] an indication that the legislature did not intend to authorize fee shifting" (id.), (iii) "by imposing an award of attorney's fees the Board moves away from its expertise in labor relations and exercises a discretionary power entrusted to a court only when specifically legislated" (id. at 805), and (iv) "[t]o the extent that the power to shift fees is justified as a deterrent to frivolous litigation . . . the power is punitive and therefore beyond the Board's delegated authority" (id. ).

For several reasons, I disagree with the suggestion that we can impose fee-shifting because of what my colleagues describe as the Board's "inherent authority to control and maintain the integrity of its own proceedings."

First, statutory authorization for a recovery of attorneys' fees is not only absent from the NLRA, but its ab-

sence stands in stark contrast to other statutes where fee-shifting has expressly been authorized by Congress.[19] This warrants a conclusion that Congress intentionally decided *not* to authorize fee-shifting in the NLRA.

Indeed, such a conclusion is inescapable from a comparison of the NLRA to the Railway Labor Act (RLA). The RLA was originally enacted in 1926 *without* any fee-shifting provision.[20] However, in 1934—while Congress was actively considering the Wagner Act legislation, which ultimately became the NLRA[21]—Congress enacted RLA amendments *including an express RLA fee-shifting provision*.[22] The NLRA's subsequent enactment *without* any fee-shifting provision compels a conclusion that Congress intended not to permit an award of attorneys' fees under the NLRA. As stated in *Alcoa Steamship Co. v. Federal Maritime Comm.*, 348 F.2d 756, 758 (D.C. Cir. 1965), "[w]here Congress has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power."

Second, there is a good reason that Congress did not authorize the NLRB to require parties to pay one another's attorneys' fees: the Act avoids the need for any party to retain counsel when pursuing Board charges and complaints.[23] Not only does the Act provide for Board attorneys to prosecute all aspects of charges and complaints (through potential review by the U.S. Supreme Court), the Act also authorizes (or, under Sec. 10(l), requires) the Board to seek or provide other unusual remedies, including injunctions providing for remedies like interim reinstatement *even before* the Board has decided whether the Act has been violated.[24] The NLRA is materially different from other statues that expressly provide for fee-shifting. These other statutes usually confer a private right of action on individuals who, in most if not all cases, at some stage must pursue their own claims with their own attorneys. As the D.C. Circuit held in *Unbelievable, Inc.*, participation by the charging party in

[19] Congress has included fee-shifting provisions in numerous other employment statutes that, similar to the RLA (and unlike the NLRA), authorize fee-shifting awards. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1988; Age Discrimination in Employment Act, 29 U.S.C. §§ 216(b) and 626(b); Americans with Disabilities Act, 29 U.S.C. § 12205; Family and Medical Leave Act, 29 U.S.C. § 2617; Workers Adjustment and Retraining Notification Act, 29 U.S.C. § 2104.

[20] 44 Stat. 577–587 (1926).

[21] The Wagner Act legislation dates back to March 1, 1934, when Senator Robert F. Wagner introduced S. 2926 during the 73d Congress. S. 2926, 73d Cong. (1934), reprinted in 1 NLRB, Legislative History of the National Labor Relations Act, 1935, at 1 (1935). Companion legislation—H.R. 8434—was introduced in the House by Representative William Connery, Chairman of the House Committee on Labor. H.R. 8423, 73d Cong. (1934), 1 Leg. Hist. 1128 (introduced March 1, 1934). Hereinafter, the two-volume compiled NLRA legislative history is referred to as "__ Leg. Hist. __."

The Wagner Act legislation was the subject of Senate Labor Committee hearings in March and April 1934 when, on April 2, 1934, important RLA amendments were introduced, which included a fee-shifting provision; and the RLA amendments were signed into law on June 21, 1934. See S. 3266, 73d Cong. (1934) (introduced April 2, 1934); S. 3266, 73d Cong. (1934) (reported favorably to Senate, April 2, 1934); H.R. 9861, 73d Cong. (1934) (introduced June 6, 1934); 78 Cong. Rec. 10,576 (Senate debates, June 6, 1934); 48 Stat. 1185–1997 (1934) (signed June 21, 1934). Congress continued its deliberations regarding the Wagner Act legislation, which ultimately was enacted—*without* any fee-shifting provisions—on July 5, 1935. See S. 1958, 74th Cong. (1935), 1 Leg. Hist. 1295; H.R. 6187, 74th Cong. (1935), 2 Leg. Hist. 2445; H.R. 6288, 74th Cong. (1935), 2 Leg. Hist. 2459; H.R. 7978, 74th Cong. (1935), 2 Leg. Hist. 2857; S. 1958, 74th Cong. (1935), 2 Leg. Hist. 2944; S. 1958, 74th Cong. (1935), 2 Leg. Hist. 3032; S. 1958, 74th Cong. (1935), 2 Leg. Hist. 2416; S. 1958, 74th Cong (1935), 2 Leg. Hist. 3238; H.R. Rep. 74–1371 (1935), 2 Leg. Hist. 3252; S. 1958, 74th Cong. (1935), 2 Leg. Hist. 3270.

[22] Under the RLA's fee-shifting provision, an award of attorneys' fees is authorized, but only in favor of a party who "shall finally prevail" in a "District Court of the United States" in a lawsuit challenging non-compliance with an order issued by a division of the National Railroad Adjustment Board (NRAB), previously known as the "National Board of Adjustment." See RLA Sec. 3, First, (p), 45 U.S.C. § 153, First, (p) (Lawsuits challenging non-compliance with an NRAB order may be filed in "the District Court of the United States," and "[i]f the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."). See also S. 3266, 73d Cong. (1934) (amendments to RLA introduced on April 2, 1934) (same).

[23] Unfair labor practice charges are initiated by a charging party—often individuals—who receive assistance from full-time Board attorneys, agents, or other individuals in NLRB Regional Offices throughout the country. The Board's regional attorneys or other regional staff conduct an independent investigation of every charge, equipped with investigative and subpoena powers (specifically authorized in Sec. 11 of the Act). These Board attorneys and staff members are responsible for obtaining affidavits in support of any charge. If the General Counsel concludes there is reasonable cause to believe a charge has merit, the General Counsel (acting through a regional director)—and not the private party—issues the complaint served on an allegedly offending employer or union. And all aspects of a complaint's prosecution, including the presentation of testimony and documentary evidence before the Board's administrative law judge, is the responsibility of the Board's General Counsel (again, typically acting through the Board's regional attorneys). After an ALJ decision is issued, the Board's General Counsel likewise is responsible for filing exceptions with the Board in support of the complaint (and for defending against any exceptions filed by the respondent employer or union). After the Board itself renders a decision, other Board attorneys pursue the case in the courts of appeals and, if certiorari is granted, the U.S. Supreme Court.

[24] See, e.g., Secs. 10(j) and (l). Longstanding Board procedures *permit* parties who support a charge or complaint to be represented by counsel, and private parties with appropriate standing can intervene in support of a complaint. See Sec. 10(b) of the NLRA; see also Sec. 102.29 of the Board's Rules and Regulations. However, as noted in the text, the Act's extensive provisions reflect a conscious decision by Congress not to confer a right of action on private parties to enforce relevant rights themselves. To the contrary, the Act provides that the Board's own personnel will be responsible, at all stages, for pursuing charges and complaints, and there is no need for the charging party or any intervening parties to have legal representation.

Board cases "is *strictly voluntary*. The union, employee, or employer filing a charge with the Board *need not play any role in the proceedings beyond serving the respondent with a copy of the charge*." 118 F.3d at 803 (emphasis added).

Third, there is no authorization in the Act for a recovery of attorneys' fees payable to the Board itself. Nobody should condone the unnecessary expenditure of public funds in agency litigation against parties whose noncompliance results in unnecessary proceedings and litigation. However, Congress made the policy judgment to create the Board and to provide public funding for the Board's activities.[25] The Act contains no provision authorizing the Board to recover its own attorneys' fees from private parties, and the Supreme Court in *Republic Steel* expressly held the Board does *not* have authority to require "payments to the Federal, State, County, or other governments" to redress "an injury to the public." 311 U.S. at 12–13. It is also noteworthy that—when we defend against claims that *the Board* should pay a respondent's attorneys' fees for frivolous, non-meritorious litigation—the Board often opposes such awards, and we have found that the only "specific legislation" authorizing a potential fee recovery is the Equal Access to Justice Act (EAJA). *Raley's*, 348 NLRB 382, 388 (2006) ("The only 'specific legislation' that could bear upon the Respondents' potential eligibility [for an attorneys' fees award] is EAJA.").[26]

Fourth, unlike my colleagues, I do not believe the Board has "inherent authority" to impose an attorneys' fees award on private parties, in the absence of authorization by Congress, merely because the Board disclaimed reliance on an "inherent authority" argument when the D.C. Circuit—in *Unbelievable, Inc*.—held the Board lacked statutory authority to require the payment of attorneys' fees.[27] As noted above, I believe the Act's structure and language—rather than merely reflecting the absence of authority to award attorneys' fees—reflects an intentional decision by Congress *not* to permit the Board to award such fees. A Board majority relied on the same "inherent authority" argument in *Camelot Terrace*, 357 NLRB No. 161, slip op. at 5, where parties argued that attorneys' fee awards were needed "as a sanction for a party's bad-faith conduct"[28] and "to protect the integrity of [the Board's] administrative processes."[29] In my view, neither contention has merit. The D.C. Circuit in *Unbelievable, Inc.* rejected the Board's argument that fee-shifting awards can be imposed based on the need to deter bad-faith, frivolous claims.[30] As to any need to protect the Board's "administrative processes," this has been raised to justify fee-shifting in a line of cases dating back to *Tiidee Products, Inc*., 194 NLRB 1234 (1972). In *Tiidee*, the Board justified a fee-shifting award to ensure that parties have "speedy access to uncrowded Board and court dockets" and to avoid "reward[ing] Respondent's delaying tactics."[31] The D.C. Circuit in *Unbelievable, Inc.* reviewed these cases, including *Tiidee* (which predated the Supreme Court's broad reaffirmation of the "American rule" presumption against fee-shifting in *Alyeska*), and nonetheless held "there must be 'clear support' for the agency's claim that the Congress authorized the agency to order one party to pay the fees of another party or of the agency itself."[32] The D.C. Circuit's ultimate conclusion regarding fee-shifting was that "the Board lacks that authority."[33]

For these reasons, I do not believe the Board can justify fee-shifting based on a claim to have "inherent" authority. If accepted, such a position would effectively eliminate any requirement of authorization by Congress and would validate non-remedial measures that the Supreme Court has consistently held may not be imposed by the Board. *Republic Steel,* supra*; Consolidated Edison,* supra; *Pennsylvania Greyhound Lines,* supra.

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[25] The Act contains detailed provisions regarding expenses of the Board, reporting by the agency regarding "moneys it has disbursed," and the treatment of other Board expenses. See, e.g., Sec. 3(c), Secs. 4(a), (b).

[26] When considering its own potential responsibility to pay for a prevailing respondent's claims for attorneys' fees under EAJA, the Board has hardly given an expansive interpretation to the potential right to recover attorneys' fees. Id. (indicating that EAJA claims "must be strictly construed in favor of the United States"); *Austin Fire Equipment, LLC*, 360 NLRB No. 131, slip op. at 1–4 (finding that meritless litigation was "substantially justified in the circumstances"), 4-6 (Member Miscimarra, dissenting).

[27] As the D.C. Circuit majority explained in *Unbelievable, Inc.*, 118 F.3d at 800 (unnumbered footnote), the Board's counsel disclaimed basing any right to impose attorneys' fees on an "alternative rationale" involving the Board's "inherent authority" to control its own proceedings.

[28] Id. (citing *Link v. Wabash R. Co*., 370 U.S. 626 (1962)).

[29] Id. (citations omitted). I agree with the reasoning set forth by former Member Hayes in his partial dissenting opinion in *Camelot Terrace*. Id., slip op. at 11–12.

[30] See, e.g., *Unbelievable, Inc*., 118 F.3d at 805 ("[I]t is not itself an unfair labor practice to present a frivolous defense to an unfair labor practice charge," and if "the power to shift fees is justified as a deterrent to frivolous litigation . . . the power is punitive and therefore beyond the Board's delegated authority.") (citation omitted).

[31] 194 NLRB at 1236.

[32] 118 F.3d at 806.

[33] Id. Disputing this point, my colleagues cite *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 fn. 13 (D.C. Cir. 1999). But in *Alwin*, the D.C. Circuit concluded that it lacked jurisdiction to consider Alwin's objections to the Board's fee-shifting remedy because Alwin had not properly preserved the issue for review as required by Sec. 10(e) and related case law. Id. at 143–144. Indeed, the D.C. Circuit stated *that it was not deciding* whether the Board has authority to award "litigation costs under its inherent authority." Id at 143 fn. 13.

*B. Front Pay (Future Pay)*

I also dissent from my colleagues' broad endorsement of "front pay in lieu of reinstatement," which would be an even more radical departure from the Board's traditional remedies. For starters, as noted above, no party here has even sought the remedy of front pay in lieu of reinstatement, the judge did not award front pay in lieu of reinstatement, and nobody has been given the opportunity to submit briefs regarding whether we have authority to award such a remedy. My colleagues concede this remedy would be unprecedented and extraordinary: we have never imposed front pay in lieu of reinstatement at any time in our history of nearly 80 years.

My colleagues refrain from the actual imposition of front pay in lieu of reinstatement in the instant case. However, their opinion all but finds that the Board has the authority under the Act to award front pay in lieu of reinstatement.[34] I believe such a conclusion is incorrect because this remedy not only appears to be unsupported by the Act, but it would do violence to the NLRA's unique focus on collective action—i.e., "*concerted* activities for the purpose of *collective* bargaining," including "self-organization" and "other *mutual* aid and protection" between and among employees in the workplace.[35]

Especially given the absence of any briefing by the parties or the solicitation of submissions from amici curiae, I credit my colleagues for their restraint in not awarding front pay in this case. However, some comment is warranted in response to this aspect of my colleagues' opinion.

(1) *Unlike Other Discrimination Statutes, the Act's Central, Near-Exclusive Focus Relates to "Collective" and "Concerted" Activities Among Employees at Work.* The National Labor Relations Act is unique among Federal employment statutes. The core focus of the NLRA relates almost exclusively to the manner in which employees interact collectively and in support of one another. In relevant part, Section 7 of the Act states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.[36]

Section 7 is the cornerstone of the Act, and it encompasses a range of activities.[37] The language in Section 7 plainly reflects the Act's focus on "collective" actions, "self-organization" and representation, and these terms shed some light on the meaning of "mutual aid or protection."[38] However, all of these protections have meaning only if employees have support from other employees *who remain part of the work force*.

Obviously, an individual employee has protection under the Act: he or she has the right to file an NLRB charge, to participate in an NLRB election, to participate in NLRB proceedings, and to refrain from engaging in protected activities. However, the Act's purpose and objectives relate exclusively to "collective" and "concerted" activities between and among multiple employees as a group. As the Board held in *Meyers Industries, Inc. (Meyers II)*,[39] employee conduct is not protected and concerted under Section 7 unless "the record evidence *demonstrates group activities*" or, at a minimum, interaction for the purpose of "*seek[ing] to initiate or to induce or to prepare for group action*."[40] See also *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964) (The Act's protection extends to actions "engaged in with the object of initiating or inducing or preparing for group action or . . . [having] some relation to group action in the interest of the employees.").

Even the NLRA's discrimination provisions are materially different from other discrimination laws. Statutes like Title VII and the Age Discrimination in Employment Act (ADEA) prohibit discrimination based on an individual employee's personal characteristics. Thus, Title VII makes it unlawful to discharge or otherwise discriminate against an employee "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The ADEA makes it unlawful to discharge or otherwise discriminate against an employee who is age 40 and older "because of such individual's

[34] Because my colleagues effectively endorse front pay as a remedy the Board should award, I disagree with their criticism of my discussion of the issue as "at best, premature."

[35] Sec. 7 (emphasis added).

[36] Sec. 7 (emphasis added).

[37] See, e.g., Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at A General Theory of Section 7 Conduct*, 137 U. Penn. L. Rev. 1673, 1682 (1989) (hereinafter Morris) (Sec. 7 embodies the "substantive content" of the Act's unfair labor practice provisions).

[38] See, e.g., *Mohave Electric Cooperative, Inc. v. NLRB*, 206 F.3d 1183, 1191–1192 (D.C. Cir. 2000) ("[T]he canon of *ejusdem generis* . . . counsels against our reading [a] general phrase to include conduct wholly unlike that specified in the immediately preceding list."). It is also well established that statutory language must be construed as a whole, and particular words or phrases are to be understood in relation to associated words and phrases. 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION (SUTHERLAND STATUTORY CONSTRUCTION) Sec. 47.16 (5th ed. 1992).

[39] 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[40] 281 NLRB at 887 (emphasis added).

age." 29 U.S.C. § 623(a)(1). By comparison, the NLRA does not protect any employee on the basis of his or her individual characteristics. Rather, it generally protects employees only concerning *what they do in relation to one another*. For employers, Section 8(a)(1) prohibits restraint, coercion, or interference with employees "in the exercise of the rights guaranteed in section 7"—i.e., in the exercise of their right to "collective" or "concerted" activities. Section 8(a)(3) makes it unlawful for employers to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment *to encourage or discourage membership in any labor organization*." For unions, Section 8(b)(1)(A) likewise makes it unlawful to restrain or coerce employees "in the exercise of [Section 7] rights," which again only protects "collective" or "concerted" activities. Section 8(b)(2) makes it unlawful for a union to "cause or attempt to cause an employer to discriminate against an employee" in violation of Section 8(a)(3).

Other provisions of the Act similarly reflect the importance that Congress attached to having employees *in the workplace*. Section 10(j) authorizes the Board to seek temporary injunctive relief in Federal court, which is frequently used to require interim reinstatement even before the Board has resolved the alleged unfair labor practices.[41] The Act's other provisions set forth additional detailed requirements regarding how employees can choose to be represented by a union (conditioned on support "by the majority of the employees" in an appropriate unit),[42] what types of picketing and other concerted activities by groups of employees are protected and restricted,[43] the Board's resolution of disputes regarding work assignments to "employees in a particular labor organization . . . rather than to employees in another labor organization,"[44] and the requirement that employers and unions "bargain collectively" in good faith.[45]

(2) *The Act's Provisions Suggest that the Board Lacks Authority to Award Front Pay Without Reinstatement*. The NLRA's predominant focus on "collective" and "concerted" employee action obviously affects what remedies "effectuate the purposes of the Act." Nothing in the Act suggests that Congress contemplated that the Board would require the payment of "future pay" to employees unconnected to the requirement that they be reinstated.[46] In fact, Section 10(c) states the opposite: the Board can order "reinstatement of employees," which, if imposed, can be "with or without backpay." The focus on "reinstatement" was made even more explicit by additional language in Section 10(c)—added in 1947 by the Taft-Hartley amendments[47]—providing that "*where an order directs reinstatement* of an employee, *backpay may be required* of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. . . . No order of the Board *shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay*, if such individual was suspended or discharged for cause."[48] The House report stated that this language "forbids the Board *to reinstate an individual* unless the weight of the evidence shows that the individual was not suspended or discharged for cause,"[49] again reflecting a view that Congress regarded "reinstatement" as the core remedy afforded by Section 10(c).

The Board has gone to significant lengths to ensure that collective strength is not dissipated based on the absence of employees who support one another or who express forceful support for or against their union. We have denounced conduct that unlawfully diminishes employee leverage or defers bargaining, for example, until "the collective strength of the employees' bargaining unit had been dissipated."[50] Awarding front pay in *lieu* of reinstatement, as a response to unlawful discrimination caused by employers or unions, would remove the most important employees from the workplace at times when their presence predictably would be most important, and when their absence would most adversely affect their fellow employees.

[41] As reported by the Board's Acting General Counsel in 2010, Sec. 10(j) injunctions "have provided a substantial and relatively swift remedy by requiring employers to offer interim reinstatement to unlawfully discharged employees pending the Board's order." Mem. GC 10–07, "Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns," at 1 (Sept. 30, 2010).

[42] Sec. 9(a).

[43] See, e.g., Sec. 8(b)(4).

[44] See, e.g., Secs. 8(b)(4)(d), 10(k).

[45] See, e.g., Sec. 8(a)(5), 8(b)(3).

[46] As indicated previously, the Board's traditional approach has always treated backpay and benefits as supplementing the remedy of requiring reinstatement (i.e., an offer of reinstatement). See fn. 17, supra.

[47] The Taft-Hartley amendments precluding reinstatement and backpay if an employee had been discharged or suspended for "cause" resulted from objections in Congress that the Board had improperly ordered reinstatement in several cases when "acts constituting the cause for discharge were committed in connection with a concerted activity." H.R. Rep. 80–510 at 39 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relation Act, 1947 (hereinafter LMRA Hist.) 543.

[48] Sec. 10(c) (emphasis added).

[49] H.R. Rep. 80–245 at 42 (1947), reprinted in 1 LMRA Hist. 333 (emphasis added), regarding H.R. 3020, 80th Cong. (1947).

[50] *Walter Pape, Inc.*, 205 NLRB 719 (1973). See also *Royal Typewriter Co.*, 209 NLRB 1006, 1015 (1974), enfd. 533 F.2d 1030 (8th Cir. 1976); *Summit Tooling Co.*, 195 NLRB 479, 481 (1972), enfd. mem. 474 F.2d 1352 (7th Cir. 1973); *Transmarine Navigation Corp.*, 170 NLRB 389, 389–390 (1968).

Similar to what the D.C. Circuit said about fee-shifting, any Board-ordered future pay awards unconnected to reinstatement would "[move] the Board . . . away from its expertise in labor relations," and the Board would exercise "a discretionary power entrusted to a court only when specifically legislated."[51] It is an understatement to acknowledge, as my colleagues do, that an award of future pay would require determinations as to "when circumstances warrant such an award, as well as the methodology of its calculation," that there is "no uniform test for when front pay may be awarded under various employment antidiscrimination statutes," and that there is no "standard method for how to calculate it." Front pay (future pay), as imposed by the courts under Title VII and comparable statutes, involves far more complex determinations than those associated with traditional NLRB backpay and benefits. Courts must decide what constitutes "essential data" to result in a "reasonably certain" calculation, "the length of time the plaintiff expects to work for the defendant," and the "applicable discount rate," while avoiding any front pay award that would be "unduly speculative." *Barbour v. Merrill*, 48 F.3d 1270, 1280 (D.C. Cir. 1995) (citations omitted). There can be an even greater risk of inappropriate front pay awards in "certain cases involving multiple plaintiffs or multiple jobs." Id. Not only are these types of more complex financial issues foreign to the Board's competence, this was recognized by the Board itself when, in 1940, the Agency abolished its Division of Economic Research,[52] and Section 4(a) of the Act—adopted by Congress in 1947—prohibits the Board from appointing personnel to engage in "economic analysis."[53] Therefore, the statute appears to preclude the Board from doing the work needed to determine whether, when or how to calculate the present value of an employee's projected future pay in lieu of reinstatement. Such a determination—if made by the Board—almost certainly would not be entitled to deference from any court. Cf. *Unbelievable, Inc.*, 118 F.3d at 805 (stating that the Board, by imposing fee-shifting awards, "moves away from its expertise in labor relations").

In my view, three final considerations reinforce a conclusion that the Act does not authorize the Board to award employees future pay in lieu of reinstatement, and such awards would be ill-advised.

First, employers or unions, if responsible for unlawful discrimination, may favor future pay awards in lieu of reinstatement to ensure discriminatees never return to the workplace. In this respect, the availability of front pay (future pay) may have the unintended consequence of encouraging some parties to engage in *worse* violations to "justify" a future pay remedy instead of reinstatement.

Second, unlike conventional reinstatement awards supplemented with backpay, Board-ordered front pay (future wages without reinstatement) would, by definition, exceed make-whole relief because the payments would be removed from any claimant's obligation to perform work. A backpay claimant has a duty to seek interim employment, and an unreasonable failure to do so reduces the amount of the employer's liability. Front pay (future pay), by contrast, involves the up-front payment of a claimant's *future* income stream—potentially for a prolonged period—without any requirement that the claimant perform work and presumably without any reduction if the claimant immediately obtains reemployment elsewhere. In combination, the remedies advocated by my colleagues—traditional backpay and benefits, combined with attorneys' fees and future wage payments unconnected to the performance of work—are likely to cause or threaten substantial economic injury or financial ruin for many employers and unions who unsuccessfully defend against Board charges. Even if rarely imposed, such remedies will cause a much larger number of employers and unions to conclude they cannot afford to raise *meritorious* defenses to Board charges or complaints based on the risk of ruinous financial liability. In these respects, Board-awarded front pay, even though well intentioned, would give parties a "powerful tool"[54] either to thwart the Act's requirements (by encouraging recalcitrant employers or unions to create the type of environment that produces a front pay award and ensures a claimant is removed from the workplace), or to improperly use Board proceedings to reap advantages in collective bargaining or union representation disputes (where the other party cannot afford the contingent risk of front pay on top of backpay and other potential Board-ordered remedies).

Third, my colleagues fail to appreciate the significance of the fact that the Board has *never* awarded front pay (future pay) at any time in our long history. The Su-

[51] *Unbelievable, Inc*., 118 F.3d at 805.

[52] 93 Cong. Rec. 6661, reprinted in 2 LMRA Hist. 1577 (June 6, 1947) (analysis of H.R. 3020). See generally John E. Higgins, Jr., *Labor Czars—Commissars—Keeping Women in the Kitchen—The Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 Cath. U. L. Rev. 941, 951–952 (1998).

[53] Sec. 4(a) states in part: "Nothing in this Act shall be construed to authorize the Board to appoint individuals . . . for economic analysis." This language was added to the NLRA as part of the Labor Management Relations Act (LMRA), 61 Stat. 136, Sec. 101 (amending NLRA Sec. 4(a)) (1947).

[54] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 683 (1981).

preme Court's *Pollard* decision indicates that courts applying Title VII and similar antidiscrimination laws adopted an "expanded" view of front pay (defined as future pay without reinstatement) in the 1970s, and "[b]y 1991, virtually all of the courts of appeals had recognized that 'front pay' was a remedy authorized" by Title VII.[55] As of 1991, the Board had interpreted and applied the NLRA's remedial provisions for more than 55 years *without* awarding "front pay" (future pay), and the Board persisted in this failure to award front pay for nearly 25 additional years. Throughout this extended time period, the Board clearly endeavored to remedy unfair labor practices with the full measure of remedial authority conferred by Congress. Thus, the Board's failure to afford front pay even once—contrary to the widespread imposition of front pay under Title VII and other statutes—is strong evidence that the Board has consistently viewed such a remedy as being unavailable under the Act. See *NLRB v. Bell Aerospace Co. Div. of Textron, Inc*., 416 U.S. 267, 274–275 (1974) ("[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration."); *Railway Labor Executives*, 29 F.3d at 669 (court rejects NMB's claimed authority to initiate representation disputes because, among other things, such a right was invoked "only in the last five years of its sixty-year history").

(3) *The Supreme Court Decision in* Pollard *Does Not Support Arguments that the Board Has Authority to Award Front Pay in Lieu of Reinstatement*. Contrary to my colleagues' assertion that the Supreme Court decision in *Pollard*[56] suggests the Board has authority to award "front pay in lieu of reinstatement," the Supreme Court in *Pollard* clearly differentiated between the remedy my colleagues embrace—front pay in lieu of reinstatement, which the Board has *never* awarded in its entire history—and the Board's backpay awards, which have *always* been limited by, and conditioned on, reinstatement.[57] Moreover, the Supreme Court's holding in *Pollard* turned on amendments to Title VII of the Civil Rights Act of 1964, which, the Court recognized, enlarged Title VII's remedial scope in relation to front pay. My colleagues fail to acknowledge that corresponding amendments have never been made to the NLRA, which has a remedial purpose and scope that, as noted above, was narrowed by Congress.

As noted above, the NLRA's remedial provision authorizes the Board to order a respondent to take "such affirmative action *including reinstatement of employees with or without backpay, as will effectuate the policies of [the] Act*."[58] By comparison, Title VII states that a court "may enjoin the respondent from engaging in [an] unlawful employment practice, and order such affirmative action *as may be appropriate*, which may include, but is not limited to, *reinstatement or hiring of employees, with or without backpay* . . . , or *any other equitable relief as the court deems appropriate*."[59]

The Supreme Court in *Pollard* explained that Congress in 1972 "expanded" Title VII's remedial provisions to include the reference to "any other equitable relief as the court deems appropriate."[60] Until this 1972 amendment occurred, the courts in Title VII cases *only* provided for the NLRB's traditional type of "backpay."[61] This traditional NLRB remedy, which the Board "called 'backpay,'" only included "'backpay' *up to the date the employee was reinstated or returned to the position he should have been in had the violation of the NLRA not occurred*, even if such event occurred after judgment."[62] Although this NLRB-awarded "backpay" was conditioned on (and limited by) reinstatement, the *Pollard* Court explained that courts used the term "front pay" when applying this traditional NLRB "backpay" remedy because (i) the employee's reinstatement, as ordered by the court, obviously occurred only "*after* judgment" was entered, and (ii) in "the Title VII context, *this form of 'backpay'* occurring after the date of judgment *[was] known . . . as 'front pay*.'"[63]

Thus, *Pollard* makes three things clear. First, the traditional NLRB "backpay" remedy was always limited by Board-ordered reinstatement even though courts called it "front pay" (since a portion of the "backpay" period occurred prior to reinstatement but after the court entered judgment).

Second, according to the Supreme Court in *Pollard*, the "broad view of front pay"—i.e., front pay in lieu of reinstatement (where courts concluded "reinstatement was not always a viable option" and began to award "front pay as a substitute for reinstatement" (id. at

[55] *Pollard*, 532 U.S. at 850.

[56] 532 U.S. at 843.

[57] I refer to Board-ordered backpay as being "limited by, and conditioned on, reinstatement" because Board-ordered backpay has invariably been treated as supplemental to the Board requirement that the employer offer reinstatement; and even if not accepted by the employee, the employer's reinstatement offer stops any further accrual of backpay liability. As noted previously, however, certain intervening events can cause backpay liability to cease earlier (or cause an offset to backpay liability) or can eliminate the requirement of reinstatement. See fn. 17, supra.

[58] Sec. 10(c) (emphasis added).

[59] 42 U.S.C. § 2000e-5(g)(1) (emphasis added).

[60] *Pollard*, 532 U.S. at 849–850.

[61] Id.

[62] Id. at 849 (emphasis added).

[63] Id. (emphasis added).

850))—*was adopted only after Congress "expanded" Title VII's remedial provision in 1972*, which for the first time authorized courts to award "any other equitable relief as the court deems appropriate."[64] The NLRB's remedial power has never been expanded to include "equitable relief" as deemed appropriate by the Board. Rather, Section 10(c) continues to limit the Board's authority to require "affirmative action *including reinstatement of employees with or without backpay*, as will effectuate the policies of [the] Act."[65]

Third, the Supreme Court in *Pollard* evaluated the treatment of front pay awards under Title VII, but acknowledged that Congress determined, in the first instance, whether or not to authorize a remedy of front pay in lieu of reinstatement. Here, the Court stated: "*Had Congress drawn . . . a line in the statute and foreclosed front pay awards in lieu of reinstatement, we certainly would honor that line*. But, as written, the text of [Title VII] does not lend itself to such a distinction, and we will not create one."[66] Unlike Title VII, I believe the text of the NLRA, and the statute's policies and purposes, only authorize backpay awards that are conditioned on and limited by reinstatement, and front pay awards (future pay in lieu of reinstatement) *are* "foreclosed" under the Act.[67]

For these reasons, as to the above issues, I respectfully concur in part and dissent in part.

Dated, Washington, D.C. October 24, 2014

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, concurring in part and dissenting in part.

There is no dispute among the Members of the Board that these Respondents engaged in serious, and at times egregious, unfair labor practices over a long period of time and that some extraordinary remedies are warranted under the circumstances of this case. I agree with my colleagues' finding of the violations for the reasons described in this decision. I write separately, because in some instances, I believe the Board majority has either overstepped its remedial authority or unwisely and without justification has piled on extraordinary and novel remedies that were neither requested by any party nor recommended by the administrative law judge. In the aggregate, some of these duplicative remedies are unnecessary to enforce the Act's remedial goals.

It is clear that Section 10(c) of the Act, as interpreted by Federal courts, provides the Board with broad discretion in designing appropriate, well-tailored remedies. See *Teamsters Local 122*, 334 NLRB 1190, 1195 (2001), enfd. mem. No. 01–1513 (D.C. Cir. 2003) (consent judgment), and *NLRB v. Mackay Radio & Telegraph Co*. 304 U.S. 333, 378 (1938). But the Board's discretion is not unlimited. See *Republic Steel Corp. v. NLRB,* 311 U.S. 7, 11–12 (1940) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235–236 (1938). The Board's authority does not include imposing remedies that are punitive or oppressive. Id.; see also *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 349–353 (1953) (finding that the Board's calculation of backpay mitigation on a quarterly basis is within its broad remedial discretion, but explaining that the Board must apply its rules in manner that is not oppressive under the circumstances). Thus, as discussed by my colleagues above, the Board is simply not free to devise punitive measures, such as penalties and fines, even if the Board may think it would effectuate the Act to do so. 311 U.S. at 11. As discussed below, I find that several of the remedies imposed by the majority taken individually, and others taken in the aggregate, go beyond the limits of make-whole relief provided for by the Act and are therefore unlawfully punitive.

First, I would not award litigation costs to either the General Counsel or the Union. Such an award is beyond the Board's statutory authority. I join Member Miscimarra's reasoned discussion of the limitations of the Board's ability to award a fee-shifting remedy. In particular, I am persuaded by the holding in *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 800–806 (D.C. Cir. 1997), as informed by the Supreme Court's rulings in *Summit Valley Industries v. Carpenters*, 456 U.S. 717, 726 (1982), *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and *Republic Steel Corp.,* supra, that the Board is foreclosed from awarding litigation costs and attorneys' fees by the absence of explicit authorization in the Act. My colleagues in the majority assert that the Board has authority to impose fee-shifting remedies in its inherent authority to police its own processes. I disagree. In accord with former Member Hayes' dissent in *Camelot Terrace*, 357 NLRB No. 161 , slip op. at 11–12 (2011) and Member Miscimarra's dissent here, I find no support for the inherent authority theory, in all its forms. Whether or not "inherent authority" is characterized as the power of the Board to guarantee speedy access to its processes, to indemnify against a

[64] Id. at 849–850.
[65] Sec. 10(c) (emphasis added).
[66] 532 U.S. at 853.
[67] Id.

public injury, to deter delay in a party's compliance, or to react to a party's bad faith, there still needs to be some clear authority given to us by Congress to award attorneys' fees, and we lack that here.[1] Moreover, "[i]t makes no sense to acknowledge that the broad grant of remedial authority to fashion remedies under Section 10(c) fails to establish the necessary 'clear support,'" required by Supreme Court doctrine, but then to "divine such powers from the vagaries of 'inherent authority' vested in article III courts." 357 NLRB No. 161, slip op. at 12 (Member Hayes, dissenting). The Board is an administrative agency created by statute, not an article III court. Id.

Second, although I agree with my colleagues that the Respondents' repeated commission of bargaining-related unfair labor practices justifies the award of bargaining costs to the Union in this case, I would not award the payment of additional moneys described by my colleagues as costs related to the exclusion of Union representatives from the premises. This remedy is both unprecedented and unwarranted. The Board has never ordered this novel remedy. My colleagues' attempt to analogize this remedy to the award of bargaining costs is misplaced. The Board justifies the award of bargaining costs in response to specific, bargaining-related violations of the Act that have caused one party to incur identifiable expenses as a result of the other party's bad faith bargaining. See, e.g., *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), enfd. in relevant part sub nom. *Unbelievable, Inc.*, 188 F.3d at 799–800. The Act requires parties to bargain in good faith, which often requires parties to incur expenses. When a party incurs expenses by attempting to bargain in good faith in the face of an opponent who obstructs the process, the Board may require the offending party to reimburse the other party's costs to restore the status quo to the nonoffending party. The exclusion of union representatives Mori and Labtingao from the premises, however, is not analogous to a pervasive, bad-faith bargaining violation. Significantly, the Act does not require the Union to engage in organizing activities by accessing the Respondents' premises, as it requires parties to bargain in good faith. Moreover, there has been no showing that the exclusion of Mori and Labtingao from the premises caused the Union to incur any additional costs and so any loss is speculative at best. Significantly, only these two individuals were excluded from the premises, not all Union representatives, and there has been no showing that unit employees lacked access to Union representatives. We have found that the exclusion of Mori and Labtingao was an unlawful unilateral change in the parties' practice. There is no showing that the Board's standard remedy of restoring the status quo and ordering the Respondents to cease and desist engaging in the unlawful activity is insufficient to remedy this violation and therefore no support for fashioning this extraordinary remedy.[2]

Third, because I agree that this case presents extraordinary circumstances, due to the volume and variety of violations committed by the Respondents, which have occurred over an extended period of time in the same workplace, as well as the Respondents' demonstrated reluctance to abide by their obligations under the Act, I agree that an extended notice period is warranted. In contrast to my colleagues, however, I would limit the extended notice and compliance period to no more than 1 year. I believe that the 3-year period is excessive and appears punitive,[3] particularly in these circumstances where the parties' relationship has at long last achieved some stability under a collective-bargaining agreement. I would not rely on the EEOC's practices cited by the majority to support a multiyear notice period. The cases cited in the EEOC's website cited by the majority involve consent decrees, not remedial orders imposed by the administrative agency. The website mentioned above expressly refers to and illustrates the EEOC's *Initiative to Eradicate Race Discrimination in the 21st Century*; as the NLRA does not prescribe comparable overarching society-wide remedial initiatives, these examples lend only minimal guidance to our implementation of the Act's remedial goals.

In contrast to my colleagues, I would grant the Respondents 28 days to accomplish the mailings of the notice, the Explanation of Rights, and the Decision and Order rather than the more limited time periods awarded

[1] In the abstract, some kind of "repeat user fee" in the form of an attorneys' fee award might be functionally appropriate where a recalcitrant employer (or union) requires the Agency to engage in multiple rounds of litigation to remedy the same pattern of violations, repeated over and over, thereby diverting public funds from the Act's enforcement in other contexts and for other parties. However, the Supreme Court ruled squarely against this indemnity-based view of the Act in *Republic Steel*, above, and, thus, it is not our place to advance such a theory under the rubric of "inherent authority."

[2] In contrast to my colleagues' suggestion, I do not take the position that remedying one type of violation is less warranted than another. Simply, I would reserve the imposition of custom-tailored new or extraordinary remedies for extraordinary violations in extraordinary circumstances. Additionally, although I may agree with the majority that the Act effectively imposes a duty to abide by a valid labor contract in various circumstances, here we are confronted with a unfair labor practice violation where the parties themselves *never* had agreed on *any measuring stick* for damages or remedies relating to their informal verbal access agreement. Therefore, I find the majority's remedy inherently speculative and punitive.

[3] This 3-year period is as long as a typical collective-bargaining agreement, and the Board lacks the authority to simply impose bargaining agreements on the parties. See, e.g., *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 102–109 (1970).

by my colleagues. Although I do not object to the mailing of these materials under the circumstances, I believe that hand delivering them directly to employees and publishing them in the Respondents' employee handbooks may be more effective means of getting across the Board's remedial messages, which may also be less onerous and costly.

Considering the extensive and extraordinary notice requirements imposed by the Board here, and in the absence of any showing that the employees cannot be reached by means of the postings, readings, and mailings of notices, I would not require the Respondents to also publish the notices in newspapers. Under the circumstances, I find this requirement to be both excessive and punitive.

Finally, I would not reach the issue of front pay whatsoever, but would defer the issue to a future case, if one is presented to the Board. I join my colleagues in adopting the traditional reinstatement and make-whole remedies for losses sustained by Villanueva because of the discriminatory discharge alleged in the complaint before us, as recommended by the administrative law judge. I concur with the majority's stated decision to defer ruling on whether and under what circumstances the Board might have authority to award front pay in lieu of reinstatement, an issue that was not raised at any time in this litigation. I do not join my colleagues' extended discussion of possible rationales or policy considerations for claiming authority to award front pay in this case or a hypothetical one. That discussion goes far beyond what is necessary to resolve this case and to set aside the question for the future. I would simply leave *any* consideration of the efficacies of this novel remedial approach to a future case, if one is presented to the Board, in which parties and other stakeholders have actually been afforded an opportunity to consider and fully brief the issues. Nor do I join my colleagues' speculation about Villanueva's past or future hardships. I would not prejudge the evidence in a future compliance proceeding by passing now on claims not yet made.

In these substantive but limited respects, I dissent from the Board's remedial order today.

Dated, Washington, D.C. October 24, 2014

Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

## APPENDIX A
### NOTICE TO EMPLOYEES
### POSTED AND MAILED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with the Union, International Longshore and Warehouse Union, Local 142, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time, regular part-time, and regular on-call concierge, concierge II, concierge II night auditor, guest service agent I, guest service II, room control clerk, bell help, bell sergeant, door attendant, head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper IB, housekeeper II, housekeeper III, laundry attendant I, seamstress, bushelp, hosthelp, waithelp, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet foodrunner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data processing clerk, senior cost control clerk, food and beverage cashier, network support specialist, diver level I, diver level II, diver level III, diver level IV, PBX operator, lead operator, maintenance 2nd, maintenance 1st, mechanic foreman, assistant/general maintenance, maintenance trainee,

senior maintenance trainee, maintenance utility, assistant gardener, assistant head gardener and gardener employed by the Employer at the Pacific Beach Hotel, located at 2490 Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marcom (sic), director of revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha Coffee Shop Manager, income auditor manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

WE WILL NOT unilaterally change your terms and conditions of employment during the course of collective bargaining without reaching a lawful impasse with the Union, or at any time without first notifying the Union and giving it an opportunity to bargain, including but not limited to restricting the exercise of previously-existing access rights of union agents to the hotel property, increasing housekeeping assignments in both the Beach and Ocean Towers, and the cessation of matching 401(k) contributions.

WE WILL NOT refuse to bargain in good faith with the Union by failing and refusing to furnish it with information the Union has requested that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees, including but not limited to 401(k) plans and employees who participated in the plans, grievances and discipline and related documents, work schedules and assignments, awards, benefits, financial data, and other terms and conditions of employment.

WE WILL NOT warn, suspend, or discharge you for supporting the Union, or any other labor organization, or because you engage in protected concerted activities.

WE WILL NOT place you under surveillance while you engage in union or other protected concerted activities.

WE WILL NOT deny union representatives access to our facility at variance with past practice, prior agreements, or the terms of collective-bargaining agreements.

WE WILL NOT undermine the Union by telling you that union agents are barred from entering the facility.

WE WILL NOT threaten your union agents with removal from the public sidewalk for passing out union literature or other protected concerted activity.

WE WILL NOT intimidate your union agents regarding lawful leafleting.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, and twice weekly for a period of 8 weeks, publish in two publications of general local interest and circulation, chosen by the Board, copies of this notice, signed by our regional vice president of operations, Robert Minicola, or his successor, and an Explanation of Rights provided by the Board regarding your rights under Federal labor law.

WE WILL, within 14 days from the date of the Board's Order, mail a copy of this notice and the Explanation of Rights to the homes of all current employees, supervisors, and managers, and all former employees employed by us at any time since November 24, 2009. WE WILL maintain proofs of mailing as required by the Board.

WE WILL, no later than 21 days and no earlier than 14 days from the date of the Board's Order, mail a copy of its Decision and Order to all current employees, supervisors, and managers, and all former employees employed by us at any time since November 24, 2009, and WE WILL, within 7 days from the date of hiring, mail a copy of the Board's Decision and Order to all newly hired employees, supervisors, and managers. Mailings shall be sent to new employees for a period of 3 consecutive years from the date of the Board's Order. The mailing shall include a copy of a cover letter, provided by the Board, explaining that the Decision and Order are being mailed pursuant to the Board's Order and referencing the notice and the Explanation of Rights previously mailed to you. WE WILL maintain proofs of mailings as required by the Board.

WE WILL, for a period of 3 consecutive years from the date of the Board's Order, provide a copy of this notice and Explanation of Rights to all new employees, supervisors, and managers, within 7 days from the date on which their employment by us begins. WE WILL retain a copy of these documents provided to each individual in our records for the 3-year period, along with receipts and documentation evidencing the date and manner of their distribution as required by the Board.

WE WILL, within 14 days after service by the Region, post this notice and Explanation of Rights at our hotel in Honolulu, Hawaii, for a period of 3 consecutive years.

In addition, WE WILL post the notice and the Explanation of Rights on our intranet and any other electronic message area, including email, where we generally communicate with you.

WE WILL, within 14 days from the date of the Board's Order, convene meetings at our Honolulu, Hawaii hotel during working time, at which this notice and the Board's Explanation of Rights will be read to you, your supervisors, and managers. The meetings shall be held in the presence of a Board agent, and this notice and the Board's Explanation of Rights shall be read by Robert Minicola (or his successor) or, at our option, by the Board agent in the presence of Minicola (or his successor), Corine Watanabe, or John Hayashi. At least one of these three individuals (or their successors) must be in attendance at each reading, and each of the three individuals must attend at least one reading. WE WILL maintain sign-in sheets for supervisors and managers at these readings, give them copies of the notice and the Explanation of Rights at the meeting, and maintain receipts as required by the Board. In addition, WE WILL afford the Union reasonable notice and opportunity to have a representative present when this notice and the Explanation of Rights are read to employees. Translation shall be made available for anyone whose language of fluency is other than English. The meetings shall be for the above-stated purpose only. If you cannot attend the meeting to which you have been assigned, you will be able to attend another meeting during which the same reading shall take place under the same conditions. WE WILL allow you to attend the meeting without penalty or adverse employment consequences, either financial or otherwise.

WE WILL give notice to and, on request, bargain with the Union as your exclusive collective-bargaining representative before implementing any changes to terms and conditions of employment that are not contained in the collective-bargaining agreement, including but not limited to access to our property by union agents, payments to your 401(k) plans, and changed or increased room assignments for housekeeping employees. For any term and condition of employment contained in the collective-bargaining agreement, WE WILL obtain the Union's consent before implementing changes to any such term.

WE WILL rescind any unilateral change limiting the Union's access to our property that is at variance with past practice or the parties' agreements and WE WILL notify union agents Dave Mori and Carmelita Labtingao, both in writing and orally, that they are no longer barred, and that we will not deny union representatives access at variance with past practice or the parties' agreements. This will not enlarge or diminish any contractual rights secured by the Union in subsequent negotiations with us.

WE WILL, within 14 days from the date of the Board's Order, rescind our unlawful unilateral changes in your terms and conditions of employment, including but not limited to the increase in housekeeping assignments in both the Beach and the Ocean Towers and the cessation of matching 401(k) contributions. This will not diminish or enlarge any contractual rights secured by the Union in subsequent negotiations with us.

WE WILL make Rhandy Villanueva whole for any loss of earnings or other benefits suffered as a result of our discrimination against him, less any net interim earnings, plus interest.

WE WILL make whole, with interest, all affected unit employees, including Marissa Julian, and former unit employees for any loss of earnings and other benefits suffered as a result of our unlawful unilateral change in housekeeping room assignments.

WE WILL compensate all affected unit employees and former unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each unit employee.

WE WILL reimburse all affected unit employees and former unit employees for matching contributions to their 401(k) plans for the period January 1, 2010, to May 1, 2010, and make them whole for any other losses suffered as a result of the unlawful change.

WE WILL, within 14 days from the date of the Board's Order, offer Rhandy Villanueva full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL furnish to the Union in a timely manner all information requested by it in November 2009 and in April, May, June, July, and August 2010, including but not limited to full data regarding our financial state.

WE WILL pay to the General Counsel the costs and expenses incurred by him in the investigation, preparation, presentation, and conduct of this proceeding before the Board, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diems, and other reasonable costs and expenses.

WE WILL pay to the Union the costs and expenses incurred by it in the investigation, preparation, presentation, and conduct of this proceeding before the Board, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diems, and other reasonable costs and expenses.

WE WILL reimburse the Union for its costs and expenses incurred in collective bargaining for all negotiations stemming from the violations found by the Board, including, for example, reasonable salaries, travel expenses, and per diems.

WE WILL pay to the Union the nonlitigation, nonbargaining expenses resulting from our unfair labor practices as found by the Board. Such expenses may include, but are not limited to, additional costs in communicating with you, holding meetings off-site due to our unlawful refusal to allow union agents on our property, and maintaining cohesion in the face of our violations when, because of our misconduct, the Union was unable to fully respond to your needs.

WE WILL within 14 days from the date of the Board's Order, remove from our files any references to the unlawful written warning, suspension, and termination imposed on Rhandy Villanueva, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the warning, suspension, and termination will not be used against him in any way.

WE WILL within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discipline imposed on Marissa Julian and any other employees in connection with our unlawful increase in housekeeping assignments, and WE WILL within 3 days thereafter, notify them in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL, for a 3-year period following the date of the Board's Order, allow the Board or any of its duly-authorized representatives to obtain at any time, in both oral and documentary forms, discovery and evidence from us, our officers, agents, successors or assigns, employees, or former employees having knowledge concerning the posting and maintenance of the notice and the Explanation of Rights as well as the mailing of those documents and the Board's Decision and Order to all new employees and new supervisors and managers in compliance with the Board's Order. WE WILL make available, for inspection by the Board, proof of mailings, receipts, and sign-in sheets, as required.

HTH CORPORATION, PACIFIC BEACH CORPORATION, AND KOA MANAGEMENT, LLC, A SINGLE EMPLOYER, D/B/A PACIFIC BEACH HOTEL

The Board's decision can be found at http://www.nlrb.gov/case/37-CA-007965 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington D.C. 20570 or by calling (202) 273-1940.

APPENDIX B

Explanation of Rights
POSTED, MAILED, AND PUBLISHED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Employees covered by the National Labor Relations Act have the right to join together to improve their wages and working conditions, including by organizing a union and bargaining collectively with their employer, and also the right to choose not to do so. This Explanation of Rights contains important information about your rights under this Federal law. The National Labor Relations Board has ordered Pacific Beach Hotel to provide you with the Explanation of Rights to describe your rights and to provide examples of illegal behavior.

**Under the National Labor Relations Act, you have the right to:**

- Organize a union to negotiate with your employer concerning your wages, hours, and working conditions.
- Support your union in negotiations.
- Discuss your wages, benefits, other terms and conditions of employment, and collective-bargaining negotiations with your coworkers or your union.
- Take action with one or more coworkers to improve your working conditions.
- Strike and picket, depending on the purpose or means used.
- Choose not to do any of these activities.

**It is illegal for your employer to:**

- Threaten you with job loss or loss of pay or benefits, or threaten to close your workplace, if you support a union or act in support of collective bargaining.
- Question you about your union sympathies or activities, or the sympathies or activities of other employees, in circumstances where that questioning tends to interfere with, restrain or coerce you in the exercise of the rights listed above.

- Promise you benefits, such as promotions, pay raises, or better treatment, in order to discourage your support for the union or for collective bargaining.
- Make unilateral changes in your terms and conditions of employment without first providing your union with notice of the proposed changes and affording the union an opportunity to bargain about the changes, except in certain situations.
- Warn, suspend, discharge, transfer or reassign you to another shift or more difficult work because you have supported the union or acted in support of collective bargaining. It is also illegal for your employer to threaten to do any of these things.
- Fire, lay off, transfer or reassign you to another shift or to more difficult work, or take other adverse action against you because you have filed an unfair labor practice charge or participated in an investigation conducted by the National Labor Relations Board. It is illegal for your employer to threaten to do any of these things.
- Spy on your activities in support of your union or collective bargaining. **There are rules that govern your employer's conduct during collective bargaining with your union.**
- Your employer must meet with your union at reasonable times to bargain in good faith about wages, hours, vacation time, insurance, safety practices and other mandatory subjects.
- Your employer must participate actively in the negotiations with a sincere intent to reach an agreement.
- Upon a request by the union, your employer is required to provide information to the union that it needs to do its job as your representative.
- Your employer must continue to bargain with the union after the contract expires and must not change existing working terms and conditions while bargaining continues.
- Your employer must honor any collective-bargaining agreement that it reaches with your union.
- Your employer cannot retaliate against you if you participate or assist your union in collective bargaining.

**Illegal conduct will not be permitted.** The National Labor Relations Board enforces the Act by prosecuting violations. If you believe your rights or the rights of others have been violated, **you should contact the NLRB promptly to protect your rights, generally within 6 months of the unlawful activity**. You may ask about a possible violation without your employer or anyone else being informed that you have done so. The NLRB will conduct an investigation of possible violations if a charge is filed. Charges may be filed by any person and need not be filed by the employee directly affected by the violation.

You can contact the NLRB's regional office, located at: 901 Market Street, Suite 400, San Francisco, California 94103–1735

Or you can contact the NLRB by calling: 415–356–5130

For more information about your rights and about the National Labor Relations Board and the Act, visit the Agency's Website: http://www.nlrb.gov.

**This is an official Government Notice and must not be defaced by anyone.**

[TRANSLATIONS]

APPENDIX C

The enclosed Decision and Order is a ruling by the National Labor Relations Board, a federal agency responsible for administering the National Labor Relations Act. The Decision and Order describes violations of that Act which the Board found were committed by HTH CORPORATION, PACIFIC BEACH CORPORATION, AND KOA MANAGEMENT, LLC, A SINGLE EMPLOYER, D/B/A PACIFIC BEACH HOTEL, in Case 37–CA–007965 et al. This official document has been mailed to you in accordance with the remedy ordered by the Board in the enclosed Decision and Order, dated October 24, 2014.

You should have already received a copy of the Notice and Explanation of Rights which was required to be mailed to you within 14 days from the date of the Board's Order. These documents are intended to help explain your rights under the National Labor Relations Act and Pacific Beach Hotel's obligations to you under the Board's ruling.

If you have any questions, call 415–356–5130.

/s/

Regional Director Region 20

*Dale K. Yashiki, Esq*. and *Trent K. Kakuda, Esq*., for the Acting General Counsel.
*Wesley M. Fujimoto, Esq*. and *Ryan E. Sanada, Esq. (Imanaka Kudo & Fujimoto),* for the Respondent.
*Dave K. Mori, Oahu Division Director, ILWU, L-142,* for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Honolulu, Hawaii, on 16 days between February 16, 2011, and April 28, 2011. The complaint in Case 37–CA–008097, as amended, issued on November 29, 2010, and the consolidated complaint, as amended, in Cases 37–CA–007965, et al., issued on January 28, 2011, by the Regional Director for Region 20.

On April 4, 2011, given the common issues of fact and law, the common parties, and in order to avoid conflicting decisions and for the sake of judicial economy, without objection I consolidated the complaint in Case 37–CA–008097 with the consolidated complaint in Cases 37–CA–007965, et al.

The complaint in Case 37–CA–008097 alleges that HTH Corporation, Pacific Beach Corporation, and KOA Management, LLC, a single employer, d/b/a Pacific Beach Hotel (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by issuing verbal warnings to its employee Rhandy Villanueva, by suspending and by terminating Villanueva.

The consolidated complaint in Cases 37–CA–007965, et al., as amended,[1] alleges that Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of employees' union activities and by announcing to employees that Union Representatives Dave Mori and Carmelita Labtingao were prohibited from entering Respondent's property.

The consolidated complaint in Cases 37–CA–007965, et al. also alleges that Respondent violated Section 8(a)(1) and (5) of the Act by ceasing to match employee contributions to its 401(k) plan, by banning Union Representatives Dave Mori and Carmelita Labtingao from Respondent's facility, by failing to furnish and unreasonably delaying in furnishing information to the Union necessary and relevant to the Union's performance of its duties as exclusive collective-bargaining representative, and by unilaterally changing terms and conditions of employment without providing the Union notice and an opportunity to bargain with respect to the alleged changes.

Respondent filed timely answers to both the complaint and consolidated complaint stating it had committed no wrongdoing.

### FINDINGS OF FACT

Upon the entire record herein, including the briefs from the counsel for the Acting General Counsel (the GC) and Respondent, I make the following findings of fact.

[1] At the hearing counsel for the General Counsel moved to amend the consolidated complaint to remove pars. 11(a), (4) and (d). There being no objection, the motion was granted.

#### I. JURISDICTION

Respondent in its answers admitted that HTH Corporation is a Hawaii corporation with headquarters in Honolulu, Hawaii, that Pacific Beach Corporation is a Hawaii corporation with headquarters in Honolulu, Hawaii, that Pacific Beach Corporation is the sole member of KOA Management, admitted that Pacific Beach Corporation has been engaged in the business of operating the Pacific Beach Hotel, providing food and lodging in Honolulu, Hawaii, and that Pacific Beach Corporation in operating the Pacific Beach Hotel annually earned in excess of $500,000 and purchased and received at the Pacific Beach Hotel products, goods, and material valued in excess of $5000 which originated from points outside the State of Hawaii.

Respondent denied KOA Management is a Delaware limited liability company or that it received revenues from the Pacific Beach Hotel. Respondent denied that HTH Corporation, Pacific Beach Corporation, or KOA Management have been affiliated business enterprises with common officers, ownership directors, management, and supervision, have a common labor policy, have shared facilities or have held themselves out to the public as a single-integrated business enterprise. Respondent denied that HTH Corporation, Pacific Beach Corporation, or KOA Management constitute a single-integrated business enterprise and a single employer.

At the hearing the parties stipulated[2] that the single-employer allegation herein was litigated by the parties in Cases 37–CA–007311, et al. before Administrative Law Judge James Kennedy and that the parties would refer to the transcript of that proceeding to determine the single-employer issue, herein. In his decision, Judge Kennedy found that the three entities in his case and herein constitute a single employer.

Following the close of the hearing herein, the Board affirmed Judge Kennedy's decision in *HTH Corp. d/b/a Pacific Beach Hotel*, 356 NLRB No. 182 (2011), herein called *HTH I*. In *HTH I*, 356 NLRB No. 182, slip op. at 5, the Board found that:

> Respondents HTH Corporation, Pacific Beach Corporation and KOA Management, LLC, together doing business as Pacific Beach Hotel, constitute a single employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I will only give a brief history of the management structure at the Pacific Beach Hotel (the hotel) as that has been extensively detailed previously by both the Board in *HTH I* and Judge Kennedy. Since at least 2002, the various enterprises herein were operated by Herbert T. Hayashi. Much of the hotel's business has come from Japan where Herbert Hayashi's nephew, John Hayashi, serves as the hotel's agent. Herbert died in 2005, leaving his share of the business to his daughter, Corine Hayashi. C. Hayashi has since married and her last name is now Watanabe. Since about December 2003, Robert M. (Mick) Minicola has been employed by both HTH and Pacific Beach Corporation. Minicola was hired as regional general manager, to oversee the King Kamehameha Kona Beach Hotel, the Pagoda Hotel and Floating Restaurant, as well as the Pacific Beach Hotel. Later, Minicola became the regional vice

[2] Jt. Exh. 1.

president of operations for both Pacific Beach Corporation and HTH. He reports to Corine Watanabe. She is the chief executive officer, though she is corporate vice president for both HTH and Pacific Beach Corporation. Watanabe did not testify in either this matter or Judge Kennedy's case. Christine Ko was Respondent's director of housekeeping, Charlene Lam was Respondent's housekeeping manager, Roselind Mad was Respondent's house-keeping clerk, Eric Hangai was Respondent's security director, Charles Sayles was Respondent's restaurant operations manager, and Margaret Yang was Respondent's recruiting and training manager. Ko did not testify in this case.

Since there has been virtually no change in the labor relations policies, ownership, or the management structure of Respondents[3] since the trial before Judge Kennedy or the Board's decision in HTH I, I conclude that HTH, PBC, and KOA (Respondent) continue to constitute a single employer[4] and are engaged in commerce within the meaning of the Act.

## II. LABOR ORGANIZATION

Respondent admitted, the Board has found, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### *A. Respondent's History with the Board*

Respondent herein operates the Pacific Beach Hotel (the hotel) on Waikiki Beach in Honolulu, Hawaii. The hotel consists of two towers, the Ocean and Beach Towers bordered by Liliuokalani and Kalakaua, Kuhio and Kealohilani Avenues. Respondent also operates the Oceanarium Restaurant in the hotel. There is a parking structure attached to the hotel that can be accessed from both Kuhio and Liliuokalani and Kalakaua Avenues. The entrances to the parking structure have been the site of many union handbilling activities directed at Respondent.

This case is yet a further chapter in Respondent's attempt to impede the rights of employees of the Pacific Beach Hotel to select and be represented by International Longshore and Warehouse Union, Local 142 (the Union). The Union's organizing drive was begun in 2002. The first NLRB election was conducted on July 31, 2002, and was overturned by the Board based on coercive interrogation of employees and maintenance of an overly broad no-solicitation rule by Respondent HTH Corporation. *Pacific Beach Corp.*, 342 NLRB 372 (2004). A second election was conducted on August 24, 2004. Among other things, the second election involved challenged ballots in a sufficient number to affect the outcome. The Board in *Pacific Beach Corp.*, 344 NLRB 148 (2005), ruled Respondent interfered with employee free choice in the 2004 rerun election by granting employees promotions and raises during the critical period. The Board directed that first, certain challenged ballots should be opened and counted, and second, in the event the revised tally resulted in a majority favoring union representation, a certification of representative was to be issued; if it did not, the Union's objections were to be sustained, and a third election conducted. The ballots were opened, counted, and a revised tally issued showing that the Union had won by one vote. Accordingly, on August 15, 2005, the Regional Director issued a certificate of representative in favor of the Union in the following unit:

> All full-time, regular part-time, and regular on call concierge, concierge II, concierge II night auditor, guest service agent I, guest service II, room control clerk, bell help, door attendant, head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, to senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper I, housekeeper II, housekeeper III, laundry attendant I, seamstress, bushelp, waithelp, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet foodrunner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data processing clerk, senior costs control clerk, food and beverage cashier, network support specialist, diver level I, diver level II, diver level III, diver level IV, PBX operator, lead operator, maintenance 2nd, maintenance 1st, mechanic foreman, assistant/general maintenance, maintenance trainee, senior maintenance trainee, maintenance utility, assistant gardener, assistant head gardener and gardener employed at the Pacific Beach Hotel, located at 2490, Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marcom (sic) [marketing], director of revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha Coffee Shop Manager, income auditor manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

It should be noted that the employer to whom the certification ran was HTH.

Respondent and the Union bargained between November 2005 and December 4, 2006. On January 1, 2007, PBHM, who the Board found is an agent of Respondent, pursuant to an agreement with KOA Management began operating the hotel and bargaining with the Union. In early August 2007, Minicola notified PBHM that it was canceling the management agree-

[3] Jt. Exh. 1.

[4] *Central Mack Sales,* 273 NLRB 1268, 1271–1272 (1984).

ment effective December 1, 2007, PBHM changed its bargaining team. As a result, PBHM and the Union memorialized a number of the tentative agreements which they had reached. It also established a daily housekeeping limitation providing that housekeepers would be assigned 16 rooms per day in the Ocean Tower and 15 rooms per day in the Beach Tower.

As of January 1, 2008, Respondent refused to recognize or bargain with the Union.

Pursuant to a complaint issued by the Regional Director for Region 20 on September 30, 2008, in HTH Corporation, Pacific Beach Corporation and KOA Management, LLC, a single employer, d/b/a Pacific Beach Hotel, Cases 37–CA–007311, et al., Judge Kennedy conducted a hearing and issued his decision on September 30, 2009. JD(SF)–35–09.

Meanwhile, on January 7, 2010, the Regional Director for Region 20 filed a petition with the United States District Court for the District of Hawaii. (CIV. NO. 10-00014JMS/LEK) seeking injunctive relief pursuant to Section 10(j) of the Act against HTH Corporation, Pacific Beach Corporation and KOA Management, LLC, a single employer, d/b/a Pacific Beach Hotel. On March 29, 2010, United States District Court Judge Michael Seabright granted the Region's petition for injunctive relief and ordered Respondent, inter alia, to cease withdrawing recognition from the Union, cease refusing to bargain in good faith with the Union, unilaterally changing terms and conditions of employment without giving notice to and bargaining with the Union. Judge Seabright also ordered Respondent to resume contract negotiations and honor all tentative agreement entered into from the point Respondent and the Union, and PBHM and the Union, left off negotiations on November 30, 2007, . . . provided, however, that the parties may in good faith reopen negotiations on any tentative agreement that has been validly affected by a change in economic or other circumstances; and to reinstate Ruben Bumanglag, Darryl Miyashiro, Virginia Recaido, Virbina Revamonte, and Rhandy Villanueva to their former job positions. 699 Fed. Supp.2d 1176 (Dist of Hawaii 2010).

As noted above, Judge Kennedy's decision was affirmed by the Board at 356 NLRB No. 182 (2011). The Board at 5–6 found Respondent violated Section 8(a)(1) of the Act by promulgating overbroad rules, by polling employees concerning their union activities, by threatening employees for being assertive during the collective-bargaining process, and by threatening employees with the loss of their jobs if the Hotel had to close because of union boycotts.

The Board found Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag, and Virbina Revamonte because of their union activities.

The Board found Respondent engaged in a litany of violations of Section 8(a)(5) and (1) of the Act by bargaining with the Union with no intention of reaching an agreement, by using PBHM as a middleman as part of a scheme to disguise their decision to deprive the employees of union representation and to escape their obligation to collectively bargain in good faith, by withdrawing recognition of the Union as the 9(a) representative of the unit employees, by unilaterally and without bargaining with the Union promulgating rules through employment offers and/or the issuance of a new employee handbook, by unilaterally and without bargaining with the Union changing housekeepers' workloads by adding 2 additional rooms to clean per day, from 16 to 18 rooms per day in the Ocean Tower and from 15 to 17 in the Beach Tower, by unilaterally and without bargaining with the Union imposing new conditions of employment on their employees, including requiring them to apply for their own jobs and treating them as new employees, requiring drug tests, and imposing a 90-day probationary period, by unilaterally and without bargaining with the Union closing the Shogun Restaurant and discharging an undetermined number of employees who worked in that restaurant, by unilaterally and without bargaining with the Union laying off hotel employees, by discharging employees Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag, and Virbina Revamonte without bargaining with the Union, by unilaterally and without bargaining with the Union reassigning certain employees to different positions and unilaterally lowering their wages, by unilaterally and without bargaining with the Union implementing wage increases for both tipping and non tipping category employees, and by refusing to provide relevant and necessary information to the Union concerning the legal relationship between PBHM and the Respondent, information concerning the management agreement between PBHM and the Respondent, and information concerning the Respondent's resumption of management of the Hotel and changes to unit employees' terms and conditions of employment that the Respondent wished to effect after they resumed management of the Hotel.

*B. Case 37–CA–008097*

1. The written warning to Villanueva

In this case in complaint paragraph 6(a) the General Counsel alleges that Respondent issued a written warning to Villanueva because of his union activity.

The Board found in *HTH I,* that Villanueva was terminated unlawfully because of his union activities in December 2007. He was reinstated pursuant to Judge Seabright's Order on April 12, 2010**.** Villanueva worked in the housekeeping department as a houseman. He had been employed by the Hotel for over 14 years. As a houseman, Villanueva performed a variety of tasks in support of the housekeeping staff, assisting with room cleaning as called upon, hallway and public area custodial work, and as a runner providing services (such as delivering rollaway beds) to hotel guests. He was classified for payroll purposes as a housekeeper II. Villanueva was selected by the housekeeping staff to be one of its representatives on the Union's negotiating committee. He served continuously on that committee from its inception in 2005 through the changeover in December 2007. During that timeframe he missed only two bargaining sessions. He often sat directly across the table from Minicola. In addition, he manned the Union's information booth on Kuhio Avenue behind the Hotel. On one occasion he noticed Minicola observing him as he attended rallies in front of the Hotel. Villanueva was terminated on November 30, 2007, pursuant to the Pacific Beach Corporation again taking operational control of the Hotel from PBHM. The Board agreed with Judge Kennedy

that the only conclusion that can be reasonably drawn is that Respondent chose not to recall Villanueva because of his union activism, including his long participation as a member of the Union's negotiating committee.

Pursuant to District Court Judge Seabright's March 29, 2010 order, Respondent reinstated Villanueva in April 2010. During Villanueva's 28-month hiatus working for Respondent, he was employed by the Union as an organizer at Respondent's hotel. After his reinstatement, Villanueva continued his union activities, including attending negotiations, attending membership meetings and talking to employees during breaks about the Union.

Villanueva was reinstated as a housekeeper II, cleaning rooms and delivering supplies to maid's closets. Prior to his 28-month hiatus, Villanueva did not clean rooms and he did not deliver supplies to maid's closets but for a brief period in 2003. After his reinstatement, Villanueva received 1 day's training in his new duties from fellow employee Larry Andrade but was never given any written rules concerning his duties.

Villanueva and other housekeepers I and II completed a production log[5] for each shift they worked. A production log must be completed for each shift worked. Villanueva filled out a production log while he worked as a housekeeper II/runner in 2007, and he completed production logs upon his reinstatement in 2010. In April 2010, Christine Ko, Respondent's director of housekeeping, told Villanueva that she was checking his production logs and that he was doing a good job.

In early May 2010, Ko told Villanueva that he did not service a room. The production log reflected that he had cleaned the room. Ko told Villanueva he should have put his time in and out of the room on his production log.

In the last week of April 2010, at a meeting with Ko, Housekeeping Manager Sandy Lam (Lam) and Housekeeping Supervisor Bobbi Hind (Hind), Ko told Villanueva that he should not have put a case of toilet paper on the top shelf of a maid's closet. This was on a floor that maid Lolita Lucas worked. Villanueva said he put the case of toilet paper on the top shelf because there was no room to put it anywhere else. In an example of Respondent making up rules on the fly, Ko advised Villanueva that in the future, if he finds that there is no room on the bottom shelf for a case of toilet tissue ordered by the room attendant, he should not deliver the toilet tissue, and that he should note on the supplies form that there was not enough room on the bottom shelf to make the delivery as requested. Ko and Hind informed Villanueva that they would inform the room attendants that if the area for the toilet tissue is not clear, the toilet tissue will not be delivered. Hind told Villanueva the next day that she had already spoken with the room attendants. A new rule was announced by Ko about 2 weeks later when she told Villanueva to put the toilet paper cases in the linen closet if the supplies closet was full and the housekeeper could call a houseman to transfer the case to the supplies closet. It is uncontested that for the 3 weeks Villanueva had been working after his reinstatement by Respondent, he had put cases of toilet paper on the top shelf and had never been advised by Ko or anyone else not to do so. While Housekeeping Manager Lam claimed every houseman was given procedures on how to stock the supply closets and knew heavy items should be placed on the ground, no evidence of the procedures or training for housemen or Villanueva specifically was proffered. Villanueva's credited testimony establishes that he had seen cases of toilet paper on the top shelves in the maid's closets on other floors.

On May 20, 2010, a month after Villanueva was told by Ko not to put the toilet paper case on the top shelf of the supply closet, she gave him a written warning for putting toilet paper on the top shelf of a supply closet and for failing to fill out his production log. The warning stated:[6]

> It is necessary to advise you the following:
>
> On April 27, 2010 at 8:37AM, Ocean Tower 20th floor housekeeper called down to the housekeeping office, saying that an opened box of toilet tissue was up on the top shelf and it was too heavy for her to bring it down to the floor.
>
> Upon checking with the houseman assignment, Rhandy delivered supplies to 20th floor the previous night. On supply order form, you check marked that you put a new box of toilet tissue on the shelf.
>
> When questioned, you said you did deliver supplies to 20th floor.
>
> Advised you that you are not supposed to put any heavy supplies up on the top shelf because it is a safety hazard also, you have to make sure you write the time received and time completed on your production log.
>
> Advised employee need to follow proper operating procedures and safety rules. Also informed employees (sic) any other incidents regarding not following procedures will result in further disciplinary action.

Respondent contends that Villanueva was warned for his failure to follow procedures concerning maintenance of his production log and for failure to follow safety procedures in stocking a supply closet with toilet paper. No written rules were produced concerning either infraction. Ko, who is still employed by Respondent, who was the manager of Villanueva's depart-ment and the person most likely to know of such procedures was not called by Respondent as a witness. She was in the best position to testify concerning what training Villanueva received in delivery of supplies and what training he received in filling out production logs. She could have testified why it took her over 3 weeks to warn Villanueva why he had not properly filled out production logs when she was reviewing his logs several times a week after his reinstatement. I will infer that if Ko had testified she would have testified Villanueva received no training regarding where to put toilet paper in supply closets, that there were no rules concerning where to put the toilet paper and that there were no rules about how to fill out his production log. *Pratt Towers, Inc.*, 338 NLRB 61, 96 fn. 81 (2002), citing *Johnson Freightlines*, 323 NLRB 1213, 1222 (1997); *Bay Metal Cabinets*, 302 NLRB 152, 173 (1990), enfd. 940 F.2d 661 (6th Cir. 1991); *Redwood Empire, Inc.*, 296

[5] GC Exhs. 14, 21.

[6] GC Exh. 3.

NLRB 369 fn. 1 (1980). See also *Seda Specialty Packaging Corp.,* 324 NLRB 350, 351 (1997); *Texaco, Inc.*, 291 NLRB 325, 338 fn. 65 (1988); *Certified Service, Inc.*, 270 NLRB 360, 365 (1984); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15 (1977)

It is uncontested that Ko never explained to Villanueva that Respondent had a rule about the location of toilet paper in the supplies closet. It is uncontested that Villanueva had seen toilet paper on the top shelf in other supply closets. Together with Ko's failure to explain Respondent's policies, a review of General Counsel's Exhibit 21 reveals that other housemen failed to record the time they received a work order and the time they completed the work order on their daily production logs without receiving a warning. Houseman Boun failed to properly complete his production logs on March 6, 10, 20, 24, 25, 26, 27, and 30, April 8–10, July 13, 14, and 19, and December 28, 2010, and often completed his production logs in the same fashion as Villanueva did prior to his discussion with Ko.[7] The only discipline that Boun received is disclosed in General Counsel's Exhibit 24, page DI to 13. Boun was not disciplined for failing to properly complete his production log. Houseman Edrada failed to properly complete his production logs on January 12 and 14, February 27 and 28, March 1, 2, 7, 8, 11 to 16, 18, 19, 21 to 23, 28, 29, and 31, April 4 to 6, 12, 15, and 17, May 2 and 26, 2010, in the same manner that resulted in discipline for Villanueva.[8] Edrada testified that he was not disciplined for failing to complete his production log properly for May 26, 2010. Similarly, housemen Ferdinand Nastor (Nastor) and Anthony Ramiro (Ramiro) failed to properly complete their production logs on a consistent basis. Records reflect six dates between January 30 and July 25, 2010, when Nastor failed to complete his production log properly[9] and six examples between May 5 and July 20, 2010, when Ramiro failed to complete his production log properly.[10] There is no evidence of either one being disciplined for this failure.

As will be seen below, it appears that Respondent made up its rules in an ad hoc fashion in an effort to justify the termination of Villanueva and rid itself yet again of a union supporter.

2. Villanueva's suspension and termination

In complaint paragraphs 6(b) and (c) it is alleged that Respondent suspended and terminated Villanueva due to his support for the Union.

Next, Villanueva was suspended by Ko on July 12, 2010, pending investigation. However, it was not until a July 20, 2010 meeting with Minicola and Union Representatives Brian Tanaka and Eadie Omanaka that Villanueva learned the specific reasons for his suspension. Villanueva was told he was suspended for using a bug spray known as "565 Plus." In response to questions from Minicola, Villanueva admitted using the bug spray in a guest room to kill a cockroach. At the meeting, Villanueva repeatedly told Minicola that he was unsure of the date of the incident. Minicola took this uncertainty to mean Villanueva was lying.

At the July 20 meeting, notes were taken by both the Union and Respondent.[11] Eadie Omanaka took verbatim notes for the Union and Lan Yao took notes for Respondent. Yao admitted that some of her notes were not verbatim but a summary of what she thought was said because she missed some of what was said at the meeting. She admitted her notes were only 90-percentaccurate.

Both Omanaka's and Yao's notes reflect that Minicola repeatedly asked Villanueva if an incident involving security occurred on July 5. While Villanueva readily admitted that he had asked security for keys to open the housekeeping office, he told Minicola he could not recall if this happened on July 5. The transcript revealed that Villanueva was cooperative, responsive to Minicola's questions and in no way appeared to prevaricate. It is credible that Villanueva was unsure of a specific date in July that he sprayed a room for insects given the fact that Minicola refused to tell the Union or Villanueva the precise nature of Villanueva's alleged infractions until the July 20 meeting. Moreover, much was made of Villanueva's use of the term "disinfectant" for the 565 Plus bug spray. It should be noted here that English is not Villanueva's primary language. At the hearing it was obvious that Villanueva's use of English was rudimentary at best. There is no dispute that Villanueva showed Hangai the can of 565 Plus when he referred to it as "disinfectant" on July 5. There could have been no doubt in Hangai's mind that Villanueva's use of the term "disinfectant" was the 565 Plus. Even Hangai's cursory look at the can in the housekeeping office on July 5 would have revealed it to be bug spray not "disinfectant."[12] It stretches credulity to suggest that Villanueva was lying or less than candid with Minicola at the July 20 meeting.

Villanueva explained to Minicola that since his return to work in April, he had used 565 Plus to kill insects on three occasions. Villanueva told Minicola that he got the bug spray from Roselind Mad, a housekeeping clerk in the housekeeping office, as he had done in the past. While Mad denied ever giving Villanueva 565 Plus, I found Mad to be an incredible witness. Her demeanor suggested she was not telling the truth when asked if she had given Villanueva 565 Plus. She refused to look at me, hesitated and answered in a voice lower than that given in her other testimony. I credit Villanueva that he had received the 565 Plus from Mad on more than one occasion. Villanueva's own contemporary production logs[13] reflects that his use of "disinfectant" was used in conjunction with bugs on numerous occasions and independently corroborate his testimony that he obtained bug spray from someone in the housekeeping office, the only location where 565 Plus was stored. Villanueva told Minicola the second time he sprayed bugs he had received a call from the night manager on duty at the hotel telling him to spray a cockroach in a guest room. Since the housekeeping office where the 565 Plus was kept was locked, the manager on duty told Villanueva to get the housekeeping office key from the security office. Villanueva got the house-

[7] GC Exh. 2 1, pp.A3–7; GC Exh. 14, pp. 1–21).
[8] GC Exh. 21, pp. B1–61.
[9] GC Exh. 21, pp. CI–11.
[10] GC Exh. 21, pp.DI–30.
[11] GC Exh. 20; R. Exh. 15.
[12] GC Exh. 12 is plainly labeled "Contact Insecticide."
[13] GC Exh. 14 at pp. 12, 25, 32, 42, and 45.

keeping key from security guard Bartolome,[14] retrieved the 565 Plus from the housekeeping office, sprayed the cockroach in the presence of two Japanese female guests, logged his action on his production log, and returned the spray to the table outside the locked housekeeping office. Villanueva explained that the third time he sprayed for insects, he got a call on his radio to spray a guest room for bugs. On this occasion, Villanueva got the key to the housekeeping office from Respondent's security director, Hangai. Hangai took Villanueva to the housekeeping office, unlocked the door, saw Villanueva get the 565 Plus and logged in the security log that Villanueva had gotten the bug spray. After Villanueva had sprayed the bugs in the guest room, he left the 565 Plus in the housekeeping bag near the front desk with his room keys and radio. Villanueva's production logs reflect that between April 21 and July 5, 2010, he sprayed guest rooms on at least six occasions.[15] The logs reflect Villanueva's use of the term "disinfectant." However, every time Villanueva used the term disinfectant it was in conjunction with killing bugs. If any manager had conducted a thorough review of Villanueva's production logs, they could not have failed to understand the connection. Villanueva explained at the hearing that he had used 565 Plus on many occasions between 1993 and 2007 and always retrieved it from the housekeeping office. Respondent failed to proffer evidence that there were written policies concerning entering the housekeeping office after it was locked for the night nor was Villanueva given any directions concerning entering the housekeeping office after hours. Villanueva also saw other employees in the housekeeping office after it had been locked during the period April to July 2010. There was no evidence adduced concerning written or verbal rules governing the use of 565.

On July 28, 2010, Respondent fired Villanueva a second time. In making his decision to terminate Villanueva, Minicola considered Hangai's report,[16] his July 20 interview with Villanueva, the statement of Roselind Mad[17] and the statement of Carazon Imanil.[18] His termination document stated that Villanueva was fired for violating various house rules including:[19]

> #1—Falsification or giving misleading information on employment application or falsification of Company records or reports. This includes falsification of jury duty note, medical certificate or time cards and /or punching, signing in/out or someone else's timecard/sheet, knowingly permitting someone to punch/sign your time card/sheet.
>
> #2—Theft or misappropriation of property (such as food, beverage or keys), unauthorized possession, embezzlement, or misappropriation of moneys or authorized storage, transfer, utilization of property belonging to the Company, guests, other employees and/or others.
>
> #12—Loitering or straying into areas not designated as work areas, or where your duties do not take you.
>
> #30—Not reporting damaged or lost items belonging to the Company, guests, or outside agencies properties: refusing to cooperate with the Company in obtaining true and factual statements; dishonesty in any form.
>
> #42—Not complying with your respective Department Rules and Procedures.

At the July 28, 2010 termination meeting, Minicola told Union Representative Lindo and Villanueva that the rule numbers listed in Villanueva's termination document were from Respondent's employee handbook.[20] Minicola said that Villanueva violated rule #1 by giving false statements during the investigation meeting on July 20, 2010; rule #2 by stealing the 565 Plus bug spray; rule #12 by going into the locked housekeeping office to get the spray without authorization; rule #30 by violating rules 1 and 2, by not returning the spray and by not being truthful during the July 20 meeting; and rule #42 by all of the conduct aforementioned. When Lindo asked what false statements Villanueva had made, Minicola said Villanueva was dishonest about what had occurred with the bug spray. When Lindo said Villanueva had not stolen bug spray but placed it in the housekeeping bag, Minicola said the spray had not been found. When Lindo asked if Hangai had been disciplined for entering the housekeeping office, Minicola said he had not and that Hangai had done a good job. When Lindo asked for copies of the procedures Villanueva had violated, Minicola said he was not sure there were any procedures and that only a limited number of people could use the 565 bug spray, only those trained to use it. No evidence was proffered about such procedures.

3. Analysis

In order to find a violation of Section 8(a)(3) of the Act, the General Counsel has the initial burden of establishing that union activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3) of the Act. The elements required to support such a prima facie violation of Section 8(a)(3) are union activity, employer knowledge of the activity, and a connection between the employer's antiunion animus and the discriminatory conduct. *Intermet Stevensville*, 350 NLRB 1270, 1274 (2007). Once the General Counsel has established its prima facie case, the burden shifts to Respondent to show that it would have taken the disciplinary action even in the absence of protected activity. *Wright Line*, 251 NLRB 1083 (1980).

Motive or animus may be inferred from all of the circumstances in the absence of direct evidence. A blatant disparity is sufficient to support a prima facie case of discrimination. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). As stated by the Board: "A pretextual reason, of course, supports an inference of an unlawful one." *Keller Mfg. Co.,* 237 NLRB 712, 717 (1978).

The disparate nature of discipline, the unprecedented scope of an investigation, the absence of a cogent reason for conducting such an investigation, and the failure to afford a

[14] Not only did Bartoleme not testify, his log entry reflects that he allowed Villanueva to enter the locked housekeeping office to retrieve bug spray on July 3, 2010.
[15] GC Exh. 14 at pp. 12, 25, 32, 37, 42, and 45.
[16] GC Exh. 17.
[17] R. Exh. 26.
[18] R. Exh. 27.
[19] GC Exh. 4.
[20] R. Exh. 7.

discriminatee any opportunity to answer the allegations raised by the investigation are factors that have repeatedly been found adequate to infer discriminatory motivation. *Tubular Corp. of America*, 337 NLRB 99 (2001).

There is ample evidence of Villanueva's union activity both before and after his reinstatement that was well known to Respondent. The record here and in HTH I is replete with evidence of Respondent's animus toward its employees and the Union. I find that counsel for the Acting General Counsel has established a prima facie case that Respondent again unlawfully warned, suspended, and terminated Villanueva. The burden now shifts to Respondent to show that they would have taken the same action in the absence of Villanueva's union activity.

I find that Respondent's proffered reasons for warning Villanueva for failing to fill out production logs and for placing toilet paper on the top shelf of the supply closet were pretext and Respondent has failed to establish they would have warned Villanueva in the absence of his union activities. There is no evidence that Respondent had any rules, written or oral, concerning where toilet paper should be placed in supply closets. As noted above by Ko's ad hoc creation of a rule concerning where to place toilet paper if the shelves were full in the supply closet, Respondent seems to make up policies as they go along without ensuring employees are notified. Moreover, there is no evidence any manager told Villanueva where he should place toilet paper. It must be remembered it had been over 7 years since Villanueva had stocked supplies and over 2 years since he had worked for Respondent. The uncontroverted evidence reflects that toilet paper was placed on the top shelf of supply closets in the past and that during April 2010 Villanueva had placed toilet paper in such a location without warning. With respect to Villanueva's alleged failure to properly fill out his production logs, the evidence amply demonstrates that Respondent had no rules and failed to discipline any employees for improperly filling out production logs.

I conclude that Respondent issued Villanueva the written warnings in violation of Section 8(a)(1) and(3) of the Act.

The Board has held that an employer's failure to conduct a fair investigation and to give the employee an opportunity to say what happened prior to the imposition of discipline are "significant factors in finding of discriminatory motivation." *Johnson Freightlines,* 323 NLRB 1213, 1222 (1997), citing *Publishers Printing Co.,* 317 NLRB 933, 938 (1995).

Respondent asserts that Villanueva violated five rules in spraying for cockroaches on or about July 5, 2010, but have presented no conclusive evidence of any violation.

Respondent contends that Villanueva violated rule #1 by giving false statements during the investigation meeting on July 20, 2010; rule #2 by stealing the 565 Plus bug spray; rule #12 by going into the locked housekeeping office to get the spray without authorization; rule #30 by violating rules 1 and 2, by not returning the spray and by not being truthful during the July 20 meeting; and rule #42 by all of the conduct aforementioned.

With respect to rule #1, as noted above, Villanueva made no false statements to Minicola on July 20. Villanueva was honest about using the bug spray and he was consistent in telling Minicola he could not remember the date or dates he used it. If Minicola had made even a cursory review of Villanueva's production logs, he would have discovered Villanueva's numerous uses of spray to kill bugs documented including on July 5, 2010. The production logs would have further discredited Mad's denial of giving Villanueva bug spray and corroborated Villanueva. Further, when Hangai admitted Villanueva into the housekeeping office he admitted Villanueva went right to the cabinet behind Mad's desk to get the spray. This familiar action by Villanueva further supports his testimony that he had gotten the 565 Plus on many occasions from Mad.

Respondent fired Villanueva for stealing bug spray in violation of rule #2. If so, Villanueva must be the dumbest man in Respondent's employ because before he "stole" the bug spray he showed Security Director Hangai exactly where he got it and then recorded that he used the same spray to kill a bug in his production record for July 5. What is truly puzzling is that Respondent did not catch Villanueva in his "lie" by reviewing disks of the surveillance cameras that scanned the front desk area where Villanueva would have failed to place the spray into the housekeeping bag. Respondent never reviewed the disks of those cameras to verify Villanueva's story. In short, there is no evidence Villanueva stole the spray can.

According to Respondent, Villanueva violated rule #12 by entering the locked housekeeping office without Ko's consent.[21] There is no dispute that Villanueva gained access to the locked housekeeping office with the permission of the manager on duty, security officers Bartolome and Hangai. However, Hangai, security guard Bartolome, and the manager on duty were not disciplined for allowing Villanueva into the locked housekeeping office without calling Ko. This discrepancy reflects not only disparate treatment of Villanueva but suggests that Respondent had no policy requiring that Ko be called prior to anyone gaining access to the locked housekeeping office. If the security manager and the security guard on duty did not know that Ko had to be called prior to an employee gaining access to the housekeeping office, it is apparent there was no such rule. It is significant that Respondent's own witness, houseman Larry Edrada, was unaware of any rule prohibiting employees from entering the housekeeping office after it closed. Ko did not testify, despite being the management official most familiar with the alleged rules regarding access to the housekeeping office and use of 565 Plus bug spray. I conclude had she testified Ko would have admitted there were no rules requiring her permission to enter the locked housekeeping office nor were there any rules regarding who could use the bug spray. Moreover, since Hangai, a management official, gave Villanueva permission to enter the office, Villanueva could not have entered without permission. Respondent's suggestion that Villanueva gained access through false pretenses by telling Hangai he needed "disinfectant" is belied by Hangai's request to see the can of bug spray.

Rules #30 and #42 are simply a reiteration of rules restatements of prior rules #1, #2, and #12. Rule #42 relates to Vil-

[21] In their brief, counsel for the Acting General Counsel moved to withdraw complaint pars. 6 and 7(e) dealing with maintaining and enforcing rule #12 in view of the Board's finding in *HTH I* that in maintaining rule #12 Respondent violated Sec. 8(a)(1) of the Act. The motion is granted.

lanueva's failure to follow policy. As noted above, since there are no policies concerning Villanueva's use of 565 Plus or his access to the office, there were no rules he could have violated.

In addition, Respondent contends that its policy allowed only a limited number of trained employees to use the 565 Plus bug spray. However, neither Roselind Mad, Respondent's housekeeping clerk who gave Villanueva the 565 Plus, nor Lam, the housekeeping manager were aware of any rules or policy concerning who could use 565 Plus. Minicola never asked for a list of who was trained to use 565 Plus.

Any contention that Villanueva violated a rule by failing to fill out a log entry when he took the 565 Plus spray is ludicrous since there is no evidence that Villanueva was required to fill out a log and since Hangai was aware Villanueva had the spray in his possession.

Respondent contends that Villanueva violated a rule when he used the 565 Plus while guests were in the room. No such rule has been established. Indeed, although houseman Edrada confirmed that he does not spray insects at night in guest rooms, he also testified that he saw nothing in writing instructing him not use bug spray in a guest room at night, nor prohibiting him from entering the housekeeping office after hours. While both Minicola and Lam testified that the hotel policy prohibits the use of bug spray in guest rooms while guests are present, Lam also stated that she is unaware of anyone informing Villanueva of this practice. Lam incredibly testified that insects reported in guest rooms where the guests are present must be caught by hand, and not sprayed. It strains credulity that a line of ants could be caught by hand.

I conclude, that like the purported rule regarding placement of toilet paper in the supply closets, the alleged rules regarding access to the housekeeping office and use of 565 Plus were made from whole cloth in an ad hoc attempt to once again justify the termination of Villanueva in retaliation for his union activity.

There is further evidence that Villanueva's alleged transgressions were treated in disparate fashion from those of similarly situated employees. Employee disciplinary records[22] reflect that during the period December 21, 2007, through December 27, 2010, Respondent disciplined 24 employees for removing guest property, i.e., cash, without authorization, taking a guest's bottle of face wash from a guest room, losing a master key, requiring all rooms to be rekeyed, being in unauthorized work areas, lying to management, failing to follow procedures, unauthorized taking of a $100 tip, failing to report $300 gift certificates found in a guest room, removing hotel or guest property from the hotel, logging rooms as cleaned that were not cleaned, removing a guest's boxes of chocolates from a guest room, failure to secure a cash bank overnight, seven instances of cash variances between $14 and $101, sleeping on the job, failure to assist a guest, allowing food to spoil, adding a tip to a guest bill, and taking food without authorization from the Hotel. Despite the seriousness of the offenses, including theft and dishonesty, none of the employees received more than a suspension.

[22] GC Exhs. 24–26.

Respondent would have me believe that Villanueva, who had no prior discipline, who never lied to Minicola or anyone else, who did not steal the bug spray, who was asked by a manager on duty to kill bugs at a guest's request, who, to the guest's' relief, killed the bugs, who was authorized to use the bug spray in guest rooms by housekeeping clerk Mad and Security Director Hangai and who was admitted into the housekeeping office twice by security officers, engaged in conduct more serious than 24 other employees who got no more than a suspension. Such a contention is untenable.

While Respondent claims that many employees were given harsher discipline than Villanueva, termination seems to be the ultimate penalty. Further, as noted above, many employees whose conduct was more serious than Villanueva received less discipline. Respondent lists 14 employees who were fired. A cursory review of the disciplinary records cited in Respondent's brief reflects that the employees fired were multiple miscreants whose conduct was far more egregious than Villanueva's. A review of the underlying records shows that employee B. Fiatoa was finally fired on August 29, 2008, after he failed to show up for work for 3 days.[23] Guest services employee J. Brash was terminated after repeated refusals and failures to perform his work duties and to follow instructions.[24] K. Chang was let go for filling out a timecard for a day he did not work.[25] S. Jung was dismissed for failure to show up for work on six occasions.[26] T. Chang was discharged for losing a master key twice, requiring rekeying of all doors.[27] Security guard A. Elieisar was drummed out because he received multiple complaints about his attitude and performance from multiple departments.[28] Security guard T. Larson was cashiered after receiving numerous complaints from employees, including complaints of sexual harassment.[29] Security guard K. Young was given his walking papers after having been previously disciplined eight times for an inability to comprehend that he had to be on time.[30] C Nami was sacked for giving confidential hotel information to outside sources.[31] M. Choi was given the ax for sleeping on the job, in plain view, outside the grand ballroom.[32] R. Corpuz was removed for theft of overtime without authorization after having been previously warned.[33] B Hee was shown the door for leaving a garbage can full of refuse in a wait station despite prior warnings.[34] P. Louis was removed for asking a guest for a tip; failing to receive the tip, he was rude to the guest; he then compounded his crime by failing to serve the

[23] GC Exh. 25 at G-8.
[24] R. Exh. 12, p. 3.
[25] R. Exh. 12 p. 13.
[26] R. Exh. 12, p. 27.
[27] R. Exh. 12, p. 80.
[28] R. Exh. 12, p. 95.
[29] R. Exh. 12, p.119.
[30] R. Exh. 12, p. 133.
[31] R. Exh. 13, p. 30.
[32] R. Exh. 13, p. 35.
[33] R. Exh. 13, p. 37.
[34] R. Exh. 13, p. 56.

guest.[35] Finally, T. Waltman was given the boot for giving false information about her workers' compensation claim.[36]

From the above facts, I find that Respondent's reasons for suspending and terminating Villanueva were a sham. Respondent has failed to show that they would have terminated Villanueva despite his union activity and his suspension and termination violated Section 8(a)(1) and (3) of the Act.

*C. The Facts in Cases 37–CA–007965, et al.*

In these cases, counsel for the Acting General Counsel contends that Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of employees' union activities on September 10, 2010, when security guards observed and photographed union representatives handing leaflets to employees entering Respondent's parking garage and by announcing to employees that Union Representatives Dave Mori and Carmelita Labtingao were prohibited from entering Respondent's property. The General Counsel also argues that Respondent violated Sections 8(a)(1) and (5) of the Act by unilaterally ceasing to match employee contributions to its 401(k) plan, by unilaterally banning Union Representatives Dave Mori and Carmelita Labtingao from entering Respondent's facility, by failing to furnish and unreasonably delaying in furnishing information to the Union necessary and relevant to the Union's performance of its duties as exclusive collective-bargaining representative, and by unilaterally changing terms and conditions of employment without providing the Union notice and an opportunity to bargain with respect to the alleged changes.

1. Respondent barred Mori and Labtingao from entering its facility

Consolidated complaint paragraph 8 alleges that on about May 6, 2010, Respondent unilaterally banned Mori and Labtingao from the premises of the Hotel in violation of an existing access agreement in violation of Section 8(a)(5) of the Act.

From about 2005 to 2007, by agreement of the parties, Respondent allowed union access to the Hotel upon notice to Minicola with the understanding that the access would not disrupt hotel operations. Respondent misrepresents the evidence when they claim in their brief that there was an oral understanding as to what constituted disruption. In response to a question from counsel for the General Counsel as to whether the parties described in their understanding what would constitute disruption to hotel operations Minicola conceded, "No, we didn't get into a lot of detail."[37] It is undisputed that from 2005 until 2007 when Respondent unlawfully withdrew recognition from the Union, Mori was granted permission to access the Hotel for bargaining and other union business.

On April 28, 2010, Minicola gave Mori and Labtingao permission to visit the Hotel to go to lunch. After being seated in the Oceanarium Restaurant, a restaurant with a large, signature aquarium, bus person Midori Fukushima approached the table at which Mori and Labtingao were seated to bring them water. From my observation of Fukushima, it is clear that her first language is not English and that her understanding of the English language is limited. At the hearing, Fukushima was assisted by a Japanese interpreter. Labtingao said, "hi," to Fukushima whom she knew from having worked at the Hotel and from union meetings. Labtingao said, "We joined the Union."[38] Fukushima replied by saying, "Oh." At the hearing, Fukushima said she was not upset by Labtingao's statement. Labtingao told Fukushima to come to her office. Fukushima went to the service area at the back of the restaurant to find out what had happened with the Union. As Fukushima walked to the service area, she saw Charles Sayles, the assistant manager for restaurant operations, standing outside his office. Fukushima asked Sayles, "[S]o, did the hotel join the union?" Sayles said, "[N]o, what did those guys tell you?"[39] Sayles told Fukushima not to go out into the restaurant and told another waiter, Nestor Baja, to do her job. Fukushima testified that she made a face at Sayles to show she did not like the fact that he was not allowing her to do her job. Fukushima remained in the restaurant service area with other wait staff, Nestor Baja and Joyce Kekona, and they complained about the Union contacting people at home without an appointment. Fukushima guessed[40] that Kekona was upset about the Union coming to her house and to the restaurant. However, other than speaking in a loud voice, as she usually did, Kekona did not stop performing her job duties.

Contrary to Sayles and Hangai, Fukushima testified she never told Sayles or Hangai she did not want to go out on the floor nor did she tell them she was upset by her conversation with Labtingao. Later, Fukushima refused to sign a statement for Respondent about what had occurred.

According to Sayles, on April 28 Fukushima approached him near his office at the back of the restaurant. She said the lady asked me you are part of the Union and Fukushima said I don't know. Fukushima identified a lady at table 4. Fukushima repeated several times, "I don't want to go out."[41] Sayles assumed this meant Fukushima felt harassed. Given the fact that Fukushima knew Labtingao for many years, her use of the impersonal "lady at table 4" to identify Labtingao is not credible. In his initial examination by the General Counsel, Sayles failed to say if Fukushima appeared upset. When asked by the General Counsel, "[W]hen you spoke with Ms. Fukushima before you went out on the floor, she never mentioned that she was—that she felt harassed did she?" Sayles replied, "Yeah, she did feel harassed." When asked what words Fukushima used, Sayles replied, "Well, she came back and, you know, she used, 'No, I don't want to go out.'"[42] According to Sayles, this conversation was conducted in English. Sayles went to Mori and Labtingao's table and said you are not allowed to talk to employees about the Union on the property and the employee felt harassed. Sayles called Hangai and told him he had an em-

[35] R. Exh. 13, p. 90.
[36] R. Exh. 13, p. 137.
[37] Tr. 1420, L. 13.
[38] Tr. at 1558, L. 5.
[39] Tr. at 1560, LL. 17–19.
[40] Tr. at 1609, LL. 16–21.
[41] In their brief, Respondent misrepresents Sayles testimony claiming that Fukushima said she did not want to go out on the floor because the union representatives were talking to her about the Union. Sayles testified only that Fukushima said, "I don't want to go out." Tr. 2505, LL. 25 to 2506; L. 11.
[42] Tr. 1467–1468.

ployee who was being harassed. Hangai went to the restaurant and spoke to Fukushima in English in the service area. According to Hangai, he asked Fukushima what had happened. She replied, "[T]hey said, 'do you know you are in the union. The Board has decided.'" Hangai asked who said that and Fukushima replied, "[T]he people at the table I was serving and I don't want to go back out there." Hangai asked if she was upset and Fukushima said yes. Hangai said she looked stiff and tense. Hangai then went to Mori and Labtingao's table and told them he had a complaint from an employee about statements they had made and that they had to leave the restaurant. Mori said he was not leaving and Hangai said he would call the police. Hangai returned to the service area and asked Fukushima if she was upset. She said she was. In the meantime, both Mori and Labtingao left the restaurant.

I credit Fukushima's testimony that she told neither Sayles nor Hangai that she was upset by her conversation with Labtingao nor did she tell them she did not want to go back out into the restaurant. Rather, she remained in the service area because Sayles told her to do so. It is clear that Fukushima's first language is Japanese. However, according to Sayles, his discussion with Fukushima was in English. Hangai also spoke English to Fukushima. It is likely that it was Sayles not Fukushima who was upset when he learned that Union Representatives Mori and Labtingao were in his restaurant and spoke to an employee about the Union. From the overreaction of both her boss, Sayles, and Security Chief Hangai, it is not surprising that Fukushima did not appear happy but rather stiff and tense. I find Fukushima's hearing testimony translated from English to Japanese is the more reliable account.

Hangai gave Minicola copies of a security report[43] concerning the incident between Fukushima and the union representatives.

On May 14, 2010, Respondent posted notices[44] to employees in the Hotel that advised employees that Union Representatives Mori and Labtingao were banned from the Hotel because they disrupted operations and that Respondent's had filed a police report of the incident. By letter[45] dated May 6, 2010, Minicola permanently banned both Mori and Labtingao from the Hotel without consultation with Mori or seeking Mori's version of what occurred.

At a meeting in early June 2010 between Mori and Minicola to discuss compliance with the 10(j) order, Mori told Minicola he excepted to being banned from the Hotel without having provided his version of what happened. Mori said that he did not speak to employees and that neither he nor Labtingao had been disruptive. When Minicola said Mori should have called him, Mori said he did not think it was a serious matter. Minicola suggested that if Mori made a verbal apology to the employees, he could come back to the Hotel. Mori said he had nothing to apologize for. A few weeks later in another meeting with Minicola, Minicola proposed that Mori apologize to the employees. Mori said Carmelita was the one who spoke. Do you want me to post? Minicola said I had to post. (Pursuant to Judge Seabright's order.) At no time did Minicola bargain with the Union over the issue of Hotel access by Mori and Labtingao before banning them.

It is well established that an employer's regular and longstanding practices, even if those practices are not required by a collective-bargaining agreement, become terms and conditions of employment that an employer may not alter without providing a union with notice and opportunity to bargain. *Turtle Bay Resorts,* 355 NLRB 706 (2010); *Lafayette Grinding Corp*., 337 NLRB 832 (2002). Where an employer has a past practice of providing union agents with access to its facilities, it cannot change that practice without first notifying and bargaining with the union to agreement or a good-faith impasse. *Granite City Steel Co.,* 167 NLRB 310, 315 (1967).

Mori followed the past practice for gaining hotel access by notifying and acquiring permission from Minicola to enter the Hotel. Despite Respondent's contention to the contrary, it is clear that neither Mori nor Labtingao violated the access agreement by engaging in disruptive behavior at the Hotel. Despite Hangai and Sayles testimony to the contrary, I have credited Fukushima that she was not upset by Labtingao's comments.

In deciding to ban Mori and Labtingao, Minicola relied on secondhand reports of what occurred without consulting with those who actually were present including wait staff Fukushima, Kekona, and Baja.

I find Respondent has fabricated another incident to thwart its employees from enjoying the benefits of their choice to have the Union represent them. There is not a scintilla of evidence that Mori or Labtingao in any way disrupted the operation of the restaurant. It was Sayles who told Fukushima to remain in the kitchen area and assigned another employee to perform her duties in a restaurant that had more fish than customers. Minicola's ludicrous suggestion to Mori that the Union post a notice and apologize to employees for a nonexistent disruption as a condition for Mori and Labtingao's access to the Hotel, reflects further that it was antiunion animus that motivated Respondent's ban rather than any disruption.

By way of defense, Respondent asserts that they made no changes to the access policy but merely enforced those provisions dealing with disruptions to the Hotel's operation. I find no merit in this defense. First, I have found there was no disruption to the Hotel's operation. Second, there was no understanding between the parties about what constituted a disruption or what consequences would arise from a disruption. Minicola was unilaterally enforcing his own definition. Respondent has the chutzpah to suggest that *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 798 (1945), stands for the proposition that absent an understanding as to what constitutes disruption, it has the right to unilaterally make such a decision and ban union representatives without bargaining. *Republic Aviation* does not support such a position. Respondent also suggests that Mori has admitted he and Labtingao harassed employees. The record is devoid of any evidence to support this proposition. Moreover, this is not a *Lechmere*[46] situation where non employees may be excluded from an employer's premises ab-

[43] GC Exh. 80.
[44] GC Exh. 45.
[45] GC Exh. 42.

[46] 502 U.S. 527 (1992).

sent a showing of an inability to communicate with the employees. Here there was an extant access policy between Respondent and the Union permitting union agents access to the hotel. Respondent is not permitted to unilaterally abrogate that policy without notice to and bargaining with the Union.

Respondent's contention that it did not abrogate the access policy since it continued to allow other union representatives access, is not supported in the law. It is not for the Respondent to decide which union representatives may have access to its facility, where access has been furnished to the Union through negotiations and past practice. Respondent's denial of Mori and Labtingao's access to the Hotel had a material, substantial, and significant negative impact on the Union's representational activity on behalf of the bargaining unit employees, and, thus, potentially affected their terms and conditions of employment. Cf. *KGTV*, 355 NLRB 1283 (2010); *Peerless Food Products, Inc.,* 236 NLRB 161 (1978).

By banning Mori and Labtingao, Respondent unilaterally changed an established access practice without first notice to the Union in violation of Section 8(a)(1) and (5) of the Act.

2. Notice to employees that Mori and Labtingao were banned from the Hotel

In the consolidated complaint at paragraph 9, it is alleged that Respondent on May 14, 2010, in announcing to its unit employees that it had permanently banned Union Oahu Division Director Mori and organizer Labtingao from its Hotel and had filed a report of the incident with the Honolulu police department, coerced and restrained employees in the exercise of their Section 7 rights.

On May 14, 2010, Minicola drafted and ordered the posting of a notice to employees informing them that Mori and Labtingao were permanently banned from the Hotel "because they disrupted Hotel operations."[47] This notice was clearly posted by the timeclock near the employees' cafeteria at the Hotel where bargaining unit employees, such as Darryl Miyashiro, would undoubtedly read it.

Where an employer seizes upon an incident as a pretext to disparage and undermine the union in the eyes of the employees, it violates Section 8(a)(1). *Sheraton Hotel Waterbury*, 312 NLRB 304 fn. 3 (1993). Minicola publicly disparaged the effectiveness of the Union by posting the notice permanently banning Mori and Labtingao for all bargaining unit employees to see. This conduct flies in the face of the District Court's order directing Respondent to recognize and bargain with the Union, after years of unlawfully refusing to do so. It is a statement to employees that the Union, even with an order from the District Court is impotent. Respondent's notice to employees of the unfounded banishment of the Union's representatives undermines the Union in the eyes of employees and it therefore violates Section 8(a)(1) of the Act.

3. The surveillance

Consolidated complaint paragraph 17 alleges that on September 10, 2010, Hangai and other security officers engaged in surveillance of employees' union activities in violation of section 8(a)(1) of the Act.

[47] GC Exh. 45.

On September 10, 2010, union field organizer Labtingao and part-time mobilizer Patrick DeCosta leafleted at the garage entrances to Respondent's hotel from about 1:30 to about 3:30 p.m. The leaflets described that Villanueva had been fired by Respondent. The garage entrances are located on Kuhio and Liliuokalani and Kalakaua Avenues. Photos[48] and a map[49] represent the locations of the garage entrances. Labtingao and De Costa handed out leaflets[50] to employees who approached the garage entrances and exits in their vehicles. Labtingao handed out leaflets at the Lilioukulani entrance while DeCosta handed out leaflets at the Kuhio entrance. During most of the time they were handing out leaflets, Respondent's security guards both observed[51] Labtingao and DeCosta and took photographs of them while handing out leaflets to employees. DeCosta and Labtingao handed out leaflets to employees they recognized or to employees wearing hotel uniforms. Photos[52] taken by Respondent reflect that both DeCosta and Labtingao handed out leaflets on the public sidewalk. Respondent contends that the photos do not show DeCosta handing out flyers to employees. This contention is unfounded as shown in General Counsel's Exhibit 83(V) and the testimony of bargaining unit employee Darryl Miyashiro who said that the photo was of his car. The sidewalk on Kuhio is demarked by flagstones. The public sidewalk runs across the ramp that leads to the garage and it ends at the street or in a grass strip near the street. On Liliuokalani and Kalakaua the sidewalk is concrete and runs across the ramp entrance to the garage. None of Respondent's photos reflect that either Labtingao or DeCosta obstructed the garage entrances or caused entering or exiting vehicles to create a traffic hazard. At about 1:45 p.m., a guard approached DeCosta and said, "[Y]ou can't be there you have to leave." DeCosta replied that he had a right to be there. "I am on a public sidewalk." At this time DeCosta was standing where the public sidewalk ended and the ramp to the garage began. This was clearly public space. The guard repeated that DeCosta was not supposed to be there and that he could not hand out things from where he was standing. A few minutes later, a second guard appeared and said to DeCosta, "What are you doing here?" DeCosta said, "[Y]ou know what I am doing." Guard two said, "[B]eat it. You're not supposed to be here." Then a third guard approached and stood shoulder-to-shoulder with guards one and two and said, "What are you doing here? You have to leave." A valet next approached, stood with the three security guards and told DeCosta he had to leave. At first, all four were about 6 feet from DeCosta but advanced to within 1 foot of him and told him he had to leave. One guard and the valet left but two guards remained and observed DeCosta from the top of the ramp near the garage entrance.

While security guards Davis and Hangai testified that DeCosta's leafleting created a traffic hazard, the photos taken by Respondent belie this allegation. Security guards Davis and Hangai both exaggerated when they said that a bus had to avoid

[48] GC Exhs. 83, 90–92.
[49] R. Exh. 33.
[50] GC Exh. 89.
[51] GC Exhs. 90, 91.
[52] GC Exh. 83 items.

an accident due to a vehicle protruding onto the street from the garage ramp. However, they admitted that the bus did not come to an abrupt stop where brakes would have caused tires to make skid marks. Davis admitted that the bus stopped at least 12 feet from the car. Hangai said a vehicle making a left turn into the Kuhio entrance caused traffic to slow. The fact that a car making a left turn may have caused traffic to slow, is the fault of the driver not DeCosta. Moreover, neither Davis nor Hangai attempted to direct traffic into the driveway so all cars would be clear of Kuhio Avenue; even though they could have done so from hotel property. Hangai also made no effort to talk with DeCosta or Labtingao about their dangerous behavior at the time, which belies the existence of any traffic hazard. I credit both Labtingao and DeCosta that they at no time blocked the garage entrances or created a traffic hazard.

An employer violates Section 8(a)(1) when it "surveils employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary' and thereby coercive." *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005). Indicia of coerciveness include the "duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation." Id. Moreover, "[p]hotographing . . . clearly constitute[s] more than 'mere observation' because such pictorial recordkeeping tends to create fear among employees of future reprisals." *F. W. Woolworth Co.,* 310 NLRB 1197 (1993).

Respondent relies on *Town & Country Supermarkets*, 340 NLRB 1410 (2001); *Saia Motor Freight Line, Inc.,* 333 NLRB 784 (2001); and *Brown Transport Corp*., 294 NLRB 969 (1989), for the proposition that an employer is justified in photographing handbilling activity based on a concern for traffic congestion and accidents.

*Town & Country Supermarkets*, supra, stands for the proposition that photographing in the mere belief that something might happen does not justify the employers' conduct. The Board requires an employer to show that it had a reasonable basis to have anticipated misconduct by the employees.

Here, there is no evidence that DeCosta or Labtingao engaged in misconduct or that Respondent had reason to believe they would engage in misconduct since Respondent concedes all prior handbilling was done without impeding traffic. Rather, Respondent's justification for photographing its employees is pretext. Respondent's own photographs reflect that neither DeCosta nor Labtingao created a hazardous traffic condition. The position of both leafleters was on the public sidewalk, they took only a brief time to hand leaflets to employees and the photos reveal that no car was blocking the street outside the garage entrances. The allegation concerning the bus is an exaggeration as there is no evidence the bus had to engage in any kind of emergency action to slow down or stop. Moreover, the lack of action by any security guard to attempt to direct traffic belies the absence of any traffic hazard that would warrant hours of surveillance and photography of employees engaged in Section 7 activities.

Respondent's 2-hour observation of and photographing the activities of DeCosta and Labtingao handing out leaflets to employees constitutes unlawful surveillance in violation of Section 8(a)(1) of the Act.

4. Security guards' intimidation of DeCosta

In their brief, counsel for the General Counsel allege that the guards' attempt to intimidate DeCosta and prevent distribution of union literature violates Section 8(a)(1) of the Act.

An unpled matter may support an unfair labor practice finding if it is closely related to the subject matter of the complaint and has been fully litigated. *Airborne Freight Corp.,* 343 NLRB 580, 581 (2004); *Hi-Tech Cable Corp.,* 318 NLRB 280 (1995); *Pergament United Sales, Inc.,* 296 NLRB 333, 334 (1989). In the instant case, the above-surveillance allegation is closely related to the issue of preventing DeCosta from leafleting. The factual issues of where DeCosta was located, i.e., on a public sidewalk or on Respondent's property, the statements made by the guards that DeCosta had to leave and the proximity of the guards to DeCosta were all fully litigated. I will consider this additional unfair labor practice allegation.

Respondent's attempt to exclude a union representative distributing leaflets to employees on a public sidewalk without producing evidence to show any property interest is also a violation of Section 8(a)(1). See *Bristol Farms,* 311 NLRB 437, 439 (1993). The Board held in *Bristol Farms,* supra at 437:

> In considering the issues raised by this case, we bear in mind the following general principles. It is beyond question that an employer's exclusion of union representatives from public property violates Section 8(a)(1), so long as the union representatives are engaged in activity protected by Section 7 of the Act.

It is undisputed that the sidewalk where DeCosta distributed handbill was a pubic thoroughfare. It is likewise undisputed that several security guards and a parking attendant seriatim told DeCosta he had to leave. At one point, three security guards and a parking attendant standing shoulder-to-shoulder approached to within 1 foot of DeCosta and told him he had to leave. I find that through the guards acting in their capacity as agents for Respondent, Respondent's, in attempting to exclude DeCosta from the public walkway, while he was engaged in activity protected by Section 7 of the Act, violated Section 8(a)(1) of the Act.

5. The unilateral changes

As noted above, by August 2007 PBHM and the Union memorialized a number of the tentative agreements which they had reached including a provision that established a daily house-keeping limitation providing that housekeepers would be assigned 16 rooms per day in the Ocean Tower and 15 rooms per day in the Beach Tower. In his order, Judge Seabright directed Respondent to:

> Resume contract negotiations and honor all tentative agreements entered into from the point Respondents and the Union, and PBHM and the Union, left off negotiations on November 30, 2007, and if an understanding is reached, embody such understanding in a signed agreement; provided, however, that the parties may in good faith reopen negotiations on any ten-

tative agreement that has been validly affected by a change in economic or other circumstances;

After Judge Seabright's order issued on March 29, 2010, the Union sought to meet with Respondent to assure compliance with the terms of the Order. Thus, on April 12, 2010,[53] the Union wrote to Respondent requesting that it, pursuant to Judge Seabright's order, rescind certain unilaterally made changes to employees' terms and conditions of employment. In addition, in April and May at least three meetings took place to discuss implementation of the 10(j) order. All discussions centered around unilateral changes that Respondent had implemented including room assignments for housekeepers, duties given to housekeepers, the medical plan, and a drug rider. Minicola said the Hotel had no intention of making retroactive payments into the 401(k) plan or for gift certificates. Some of the information requests the Union sent to Respondent, including the June 8, 2010 information request were for the purpose of determining what terms and conditions of employment had changed since December 2007 when Respondent refused to recognize the Union in order to restore the status quo pursuant to Judge Seabright's order. Thus, on June 14, 2010,[54] Mori sent Minicola a list of the tentative agreements that had been entered into and asked Minicola to confirm them. Minicola did not respond. Minicola insisted that these early sessions were bargaining sessions, yet at the June 24, 2010 meeting when Minicola declared impasse, Mori responded how can there be impasse if you haven't confirmed the tentative agreements reached. By June 24, 2010, Respondent had not provided the Union with any of the information to determine what changes in unit employees' terms and conditions of employment had taken place. Moreover, on June 24, 2010, Respondent declared impasse due to economic exigencies without providing the Union with the underlying financial information needed to assess the validity of Respondent's claim. Included in the changes Minicola announced pursuant to the impasse were changes in room assignments and stopping matching contributions to the 401(k) plan. When Mori said the changes violated Judge Seabright's 10(j) order, Minicola replied, "Fuck the judge. He's wrong." Mori inquired about his previous information requests and said he needed the information for bargaining in order to determine the status quo. Minicola said Judge Seabright's order required the status quo to begin in 2010. Minicola claimed the information requests were a ploy by the Union to slow down bargaining. In discussing whether Respondent's actions violated Judge Seabright's order, Minicola said, "It's not illegal unless I go to jail." Minicola denied he said, "Fuck the judge." I found Minicola to be an evasive, often unresponsive witness whose statements in many cases were absurd or self-serving. I credit Mori's testimony which I found consistent, responsive, and detailed. Judge Kennedy also found Minicola an implausible, disingenuous witness.[55]

[53] GC Exh. 36.
[54] GC Exh. 52.
[55] JD(SF)–35–09, September 30, 2009, p. 40, LL. 1–6, 21–22.

The 401(k) plan

Consolidated complaint paragraph 7 alleges that on or about November 19, 2009, Respondent, without notice to or bargaining with the Union, notified employees that it would cease matching unit employees' contributions to its 401(k) plan, and did so effective January 1 to May 1, 2010.

Respondent has maintained a 401 (k) plan[56] and made matching employee contributions to that plan from at least December 1, 2007, until January 1, 2010. Upon an employee's completion of 1 year of service, Respondent would match 100 percent of the employee's pretax contributions up to I percent of the employee's compensation. After an employee had completed 3 years of service, Respondent would match 100 percent of the employee's pretax contributions up to 3 percent of the employee's compensation. As noted above, Respondent refused to recognize or bargain with the Union until March 29, 2010, when United States District Court Judge Seabright ordered Respondent to recognize and bargain with the Union. However, on November 19, 2009,[57] Respondent announced it was ceasing matching contributions to employees' 401(k) plans as of January 1, 2010. This change was made without notice to or bargaining with the Union. On May 1, 2010,[58] Respondent resumed making matching contributions to employee 401(k) plans but has not reimbursed employees for the loss of employer contributions from January 1 to May 1, 2010.

In their brief, Respondent seems to suggest that the Union may have waived its claim to back payments from Respondent for employer contributions from January 1 to May 1, 2010, by not continuing to request information requested from Respondent in November 2009 regarding a list of employees affected by changes to the 401(k) plan. This argument is ludicrous. Recall that Respondent refused to recognize or bargain with the Union until Judge Seabright's order of March 29, 2010. Only then on about May 5, 2010, did Respondent furnish part of the information responsive to the Union's request. There was no waiver by the Union. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 fn.12 (1983).

There can be no doubt that employer contributions to a 401(k) plan is a mandatory subject of bargaining. *Lakeside Healthcare Center*, 340 NLRB 397, 399 (2003). The unilateral failure to make matching payments.

Respondent contends that economic exigencies permitted them to make the unilateral changes in ceasing matching payments to employees' 401(k) plan citing *Bottomline Enterprises*, 302 NLRB 373 (1991). Respondent's reliance on *Bottomline Enterprises* is misplaced. Where parties are engaged in negotiations over a collective-bargaining agreement, an employer has a heightened obligation to refrain from unilateral changes. An employer must refrain from implementation of any changes to terms and conditions of employment, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.' *Bottom Line Enterprises,* 302 NLRB at374.

Overall impasse was not possible on June 24, 2010, when Minicola announced his intent to unilaterally cease making

[56] GC Exh. 33.
[57] GC Exh. 34.
[58] GC Exh. 39.

401(k) contributions and to implement the increase to housekeepers' daily room assignments, because formal contract negotiations had not resumed by that time. Contrary to Minicola's assertion, the meetings to this point dealt with establishing the status quo pursuant to Judge Seabright's 10(j) order. Evidence of the lack of contract negotiations is affirmed in that the three meetings between Mori and Minicola in April and May 2010 did not include the negotiating committees, which ran counter to the established past practice for contract negotiations between the parties. Mori credibly testified that all three meetings with Minicola were to lay the foundation for restarting contract negotiations. Actual contract negotiations resumed on August 30, 2010, with the bargaining committee members present. Moreover, Respondent cannot declare impasse on a few subjects, and then implement unilateral changes based on them. *Bottom Line,* supra, requires an overall impasse prior to an employer's implementation of any unilateral change. That is simply not the case here.

There are only a few exceptions to *Bottom Line's* prohibition on unilateral changes during contract negotiations. An employer engaged in contract negotiations may implement a unilateral change without reaching an overall impasse when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, and when economic exigencies compel prompt action. An employer must proffer evidence of its economic circumstances at the time it takes action. *Bottom Line,* supra at 374. In *RBE Electronics of S.D.,* 320 NLRB 80, 81 (1995), the Board further defined the economic exigency exception:

> In cases subsequent to *Bottom Line*, the Board has characterized the economic exigency exception as requiring a heavy burden, and as involving the existence of circumstances which require implementation at the time the action is taken or an economic business emergency that requires prompt action. . . . Absent a dire financial emergency, the Board has held that economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action. [Citations omitted.]

In *RBE,* supra, the Board noted an additional exception where an employer is confronted with an economic exigency compelling prompt action short of the type relieving an employer of its obligation to bargain entirely. The employer will satisfy its statutory burden by providing the union with adequate notice and an opportunity to bargain. *RBE Electronics of S.D.,* 320 NLRB at 81–82. This exception is "limited only to those exigencies in which time is of the essence and which demand prompt action Therefore, Respondents are required to "show a need that the particular action proposed be implemented promptly." Additionally, consistent with the requirement that employers prove the proposed change was "compelled," Respondents would have to show that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable. *RBE,* supra at 82.

On June 24, 2010, Respondent presented no evidence of an economic exigency, either catastrophic or lesser requiring implementation of changes to the 401(k) plan. Minicola merely made reference to Respondent's general economic conditions and poor economic performance in 2008 and 2009. However, Respondent never presented any evidence until August 2010 of economic exigency or an unforeseen exigency compelling immediate action. Moreover, the evidence presented in August 2010[59] was insufficient to assess whether there was an economic exigency.

Respondent suggests in their brief that the Union delayed and avoided bargaining. Assuming, arguendo, that Mori declined to bargain about the 401(k) contributions or the rooms assignments, in the period April to June, it must be recalled that Respondent had yet to confirm any tentative agreements as ordered in the 10(j) order nor had Respondent furnished the Union with information concerning changes that had been made to the 401(k) plan or to housekeeping room assignments. As of June 24, 2010, the Union was not in a position to bargain, lacking information to do so.

I find that in ceasing to make matching contributions to employee 401(k) plans without notice to or bargaining with the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

The room assignments

Consolidated complaint paragraph 16 alleges that on about June 24, 2010, Respondent unilaterally and without notice to or bargaining with the Union changed terms and conditions of employment by increasing the number of rooms housekeepers must clean per shift from 16 to 18 in the Ocean Tower and from 15 to 17 in the Beach Tower.

In *HTH I,* the Board found Respondent violated Section 8(a)(1) and (5) of the Act around December 1, 2007, by unilaterally and without bargaining with the Union changing housekeepers' workloads by adding 2 additional rooms to clean per day, from 16 to 18 rooms per day in the Ocean Tower and from 15 to 17 in the Beach Tower. On March 29, 2010, the U.S. District Court issued its Injunctive Order requiring Respondent to rescind any unilateral changes upon request by the Union. By letter[60] dated April 12, 2010, Mori directed that the daily housekeeping room assignments be restored to 15 per day in the Beach Tower and 16 per day in the Ocean Tower. Respondent then restored the daily room assignments for housekeepers to 15 per day in the Beach Tower and 16 per day in the Ocean Tower sometime in April 2010. In a letter[61] dated June 24, 2010, Respondent announced to the Union that, due to economic hardship, it was, inter alia, reinstating housekeeping room assignments as of July 1, 2010. By letter dated June 25, 2010, Mori confirmed that Respondent was rescinding housekeeping room assignments of 15 rooms in the Beach Tower and 16 rooms in the Ocean Tower as of July 1.

Respondent's housekeeper of 16 years, Virginia Recaido, was terminated by Respondent in December 2007. Both Judge Seabright and the Board in *HTH I* found that her termination violated Section 8(a)(1) and (3) of the Act and ordered her reinstated. Respondent reinstated Recaido in April 2010 after Judge Seabright's order issued. Recaido testified without contradiction that before December 2007 she cleaned 16 rooms per

[59] GC Exhs. 78,79.
[60] GC Exh. 36.
[61] GC Exh. 54.

shift in the Ocean Tower and 15 rooms in the Beach Tower. On April 18, 2010, Recaido and 30 other room attendants were told by Assistant Housekeeper Bobbi Hind[62] that they were to clean 15 rooms in the Beach Tower and 16 rooms in the Ocean Tower per shift. On July 1, 2010, Hind told 30 assembled room attendants that they were to clean per shift 18 rooms in the Ocean Tower and 17 rooms in the Beach Tower. From July 1 to September 16, 2010, Recaido cleaned 18 rooms per shift in the Ocean Tower. On September 16, 2010, Recaido's work assignments were reduced to 16 rooms per shift in the Ocean Tower. However, from October 1, 2010, to April 11, 2011, Recaido has had to clean 18 rooms per shift in the Ocean Tower.

According to Respondent's brief, the room assignments reverted back to the number set forth in the District Court Order in September 2010 and then fluctuated. However, Recaido's work assignment sheets for the period July 1 to December 5, 2010,[63] support her testimony. The July 1, 2010 changes made by Respondent were done without notice to or bargaining with the Union.

Changing the number of rooms housekeepers are assigned to clean per day has a material and substantial impact on housekeepers' terms and conditions of employment. By increasing the number of rooms assigned to housekeepers per day by two in each tower, Respondent increased the number of rooms the housekeepers are responsible for cleaning, and therefore increased housekeepers' overall workload. Such a change was impermissible without first providing the Union with an opportunity to bargain.' *HTH I,* supra at 2, 35, 37.

Respondent suggests in their brief that there has not been an actual increase to the number of rooms housekeepers actually clean because housekeepers might encounter do-not-disturb rooms or rooms that refuse service. The evidence does not support this contention. Recaido testified that housekeepers do not know whether they will encounter any rooms with do-not-disturb signs when they receive their daily room assignments. As a result of this uncertainty, housekeepers still increase the pace of their work to clean two additional rooms a day because they are not always fortunate enough to encounter rooms that do not require service.

Respondent contends that any changes to room assignments were de minimus, citing *Oneida Knitting Mills, Inc*., 205 NLRB 500 (1973), contending that the changes lasted just a few months. The Board has dealt with this issue in *HTH I,* finding the changes in room assignments a mandatory subject of bargaining.

Moreover, Respondent disciplined[64] housekeepers who failed to clean their assigned number of rooms. Respondent's own exhibit indicates that after July 1, 2010, when the unilateral increase went into effect, Respondent disciplined housekeeper Marissa Julian[65] for failing to clean the 17 rooms assigned to her in the Beach Tower, and directed her to pace herself properly to complete all room assignments. Based on the foregoing, Respondent cannot sustain their de minimus argument, especially when the Board has held that the mere threat of discipline for breach of a unilaterally implemented policy is sufficient to establish that the policy constitutes a material change in working conditions. *Ferguson Industries,* 349 NLRB 617, 618–619 (2007).

Respondent contends further than *Bottom Line Enterprises*, 302 NLRB 373 (1991), permits Respondent to make the unilateral changes given the Union's refusal to bargain and Respondent's own economic exigencies.

This is the same argument Respondent has made concerning cessation of contributions to employees' 401(k) plans discussed above in section C,1. According to Minicola, on June 24, 2010, he told the Union that he needed to change the number of room assignments for operational and financial reasons but Mori refused to discuss room assignments absent an overall collective-bargaining agreement. Minicola said he would implement the room assignment changes and the parties could discuss the effects. Mori made it clear that negotiations would not take place until his employee negotiating committee was reestablished after an absence of over 2 years. As noted above, no overall impasse was ever reached in collective bargaining between the parties. Despite this, Minicola provided no evidence of any economic exigency or other unforeseen circumstances justifying the need to immediately implement room assignment changes.

Respondent contends that they gave the Union notice of the changes and an opportunity to bargain about the room assignments. As noted above, in order to avoid piecemeal bargaining an employer must refrain from implementing any changes until there is overall impasse, absent an exception, not merely impasse on some subjects.

By implementing the changes to room assignments on July 1, 2010, during collective bargaining for a first contract without reaching overall impasse, Respondent violated Section 8(a)(1) and (5) of the Act.

6. The information requests

Consolidated complaint paragraphs 10, 11, 12, 13, 14, and 15 allege that Respondent failed to provide or failed to provide in a timely fashion, information the Union had requested that was necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of unit employees.

November 24, 2009

After discovering that Respondent planned to cease making matching 401(k) contributions for unit employees, on November 24, 2009, Mori sent an information request[66] to Minicola requesting the (1) names, job titles, rates of pay, and hire dates of all bargaining unit employees who would be affected by Respondent's decision to change the 401(k) plan; (2) a copy of the 401(k) plan for the last 3 years; (3) an auditor's financial report for the past 2 years, including balance sheets, statements of operations and statements of cash flow; (4) corporate income tax schedules for the past 2 years; and (5) a schedule showing a

[62] Hind did not testify at the hearing.

[63] GC Exh. 93.

[64] GC Exh. 24, pp. A10, 14, 21, 28, I 15, 21, 31, 52. R.' Exh. 14, pp. 53, 98, and 100.

[65] R. Exh. 14, p. 53.

[66] GC Exh. 35.

breakdown of executive compensation, wages for unit employees, and wages for all other employees for the past 2 years.

Only after Judge Seabright's order of March 29, 2010, did Respondent on about May 5, 2010, furnish information responsive to item (2). Respondent has provided no other information.

Respondent asserts that they satisfied their duty of providing information by suggesting that the Union may have waived its claim to information about the 401(k) plan by not continuing to request information requested from Respondent in November 2009. This argument is without merit. Recall that Respondent refused to recognize or bargain with the Union until Judge Seabright's order of March 29, 2010. Only then on about May 5, 2010, did Respondent furnish part of the information responsive to the Union's request. Moreover, even if Respondent claimed such a waiver, they would need impressive evidence. As explicated in *Plough, Inc.,* 262 NLRB 1095, 1104 (1982):

> A "waiver" will not be lightly inferred however, and a waiver of a statutory right to requested relevant information must be clear and unmistakable. *Globe-Union, Inc.,* 233 NLRB 1458 (1977). A waiver requires "conscious relinquishment by the Union, clearly intended and expressed." *Perkins Machine Company,* 141 NLRB 98, 102 (1963).

There was no waiver by the Union. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 fn. 12 (1983). By failing to provide the information requested in its November 24, 2009 information request Respondent violated Section 8(a)(1) and (5) of the Act.

April 21, 2010

By letter[67] dated April 21, 2010, Union Business Agent Karl Lindo requested information from Respondent in conjunction with a grievance filed on behalf of terminated employee George Ishikawa. The information request included, inter alia, items such as: investigative notes, reports, statements, interviews, memos related to the Respondent's effort to discover if the employee violated Respondent's rules; names, addresses, and positions of witnesses to the relevant incidents; names, addresses, and positions of all management personnel who made recommendations for or against discipline and; prior disciplinary actions of other employees for violations of the same rules. On April 26, 2010,[68] Minicola acknowledged receipt of Lindo's April 21 letter, but provided none of the requested information. In letters of May 21[69] and June 8, 2010,[70] the Union renewed its request for information in Lindo's April 21, 2010 letter. To date none of the requested information has been provided.

This information is directly related to terms and conditions of employment of a disciplined bargaining unit employee and is therefore presumptively relevant. *Disneyland Park***,** 350 NLRB 1256, 1257 (2007). With respect to Respondent's investigative notes, witness information, and information about management decisionmakers, Respondent has not offered a timely confidentiality claim to balance against the relevance of the Union's request. *Exxon Co. USA,* 321 NLRB 896, 898 (1996) (in order to trigger a balancing test, an employer must first timely raise and prove its confidentiality claim),

Lindo also requested statements from certain managers and employees which Respondent relied on to terminate Ishikawa. Minicola told Lindo that witness statements were used in deciding to discipline Ishikawa. Thus, the statements were relevant to a determination of the validity of Ishikawa's termination.

Under current Board law, the duty to furnish relevant information does not encompass the duty to furnish witness statements themselves. *Fleming Cos.,* 332 NLRB 1086, 1087 (2000); *Anheuser-Busch,* 237 NLRB 982, 984 (1978). However, the Board has indicated that in order to constitute a witness statement, the witness must be given assurances that the statement will remain confidential. *New Jersey Bell Telephone Co.,* 300 NLRB 42, 43 (1990). In this case, there is no evidence that Respondent provided confidentiality assurances to witnesses which would otherwise qualify their statements as "witness statements." Even assuming, arguendo, that the statements themselves are privileged from disclosure to the Union under *Fleming* and *Anheuser-Busch,* the Union is entitled to receive summaries of these relevant statements. P*ennsylvania Power Co.,* 301 NLRB 1104 (1991).

Respondent contends that there is no grievance procedure in effect, citing Minicola's letter[71] to Lindo of April 26, 2010. However, that same letter acknowledges that Respondent:

> . . . [W]ould follow the employee handbook in effect at the time. The procedure provided that the Union could appeal the decision first to the Hotel's Human Resource Manager. If the Union was dissatisfied with the decision following the first level appeal, the Union had a final appeal to the Hotel's General Manager.

Respondent also contends it is their policy not to provide the Union with employee disciplinary records.

Respondent also cites *Swearingen Aviation Corp*., 227 NLRB 228, 236 (1976), and *Asarco, Inc.,* 316 NLRB 636 (1995), for the proposition that absent a grievance-arbitration provision in a collective-bargaining agreement, an employer has no obligation to provide information to a union regarding employer discipline.

The absence of a contractual grievance-arbitration procedure does not extinguish the Union's right to or Respondent's concomitant obligation to provide information related to disciplinary actions involving bargaining unit employees. As the Board found in affirming the administrative law judge in *Westside Community Mental Health Center,* 327 NLRB 661, 667 (1999):

> While the grievance procedure was in-house and not based on a collective-bargaining agreement, the Union's representational interests are not any less. The Union's interest was legitimate and substantial. It was representing its members and, the Union had a right to request information relevant to its determination of whether Respondent breached existing practices and policies in disciplining Hollenback and Spencer, to advise employees of their rights in the event they were treated disparately, and to otherwise represent these members in an

[67] GC Exh. 37.
[68] GC Exh. 38.
[69] GC Exh. 41.
[70] GC Exh. 50.
[71] GC Exh. 38.

> appropriate fashion either through the internal grievance mechanism or otherwise.

Here, there is no dispute that Respondent followed an existing two-step appeals process and there was no existing contractual grievance-arbitration procedure. This appeals process served as a type of in-house grievance procedure that the Union or employees could use to appeal disciplinary actions. Clearly, under *Westside Community Health Center,* the Union had a substantial representational interest and obligation to its members in determining if Respondent breached their policies in disciplining employees and to represent those employees in the internal grievance procedure.

Respondent's citations to *Swearingen Aviation Corp.* and *Asarco, Inc.,* are inapposite. In *Swearingen,* there was no certified collective-bargaining representative of the employees, hence no obligation to furnish information. In *Asarco,* the Board affirmed an administratve law judge's finding that the employer was required to furnish the union with information to process a grievance. However, *Asarco does* not stand for the proposition that the union is entitled to information only if there is a contractual grievance-arbitration *process.*

Accordingly, I find that Respondent, in refusing to provide information requested on April 21, 2010, in conjunction with a grievance filed on behalf of terminated employee George Ishikawa, violated Section 8(a)(1) and (5) of the Act.

May 28, 2010

By letter[72] dated May 28, 2010, Lindo requested information from Respondent in conjunction with a grievance filed on behalf of disciplined employee Villanueva. The information request included, inter alia, items such as: the specific rule violated, investigative notes, reports, statements, interviews, memos related to the Respondent's effort to discover if the employee violated Respondent's rules; names, addresses, and positions of witnesses to the relevant incidents; names, addresses, and positions of all management personnel who made recommendations for or against discipline and; prior disciplinary actions of other employees for violations of the same rules. In a letter dated June 18, 2010,[73] the Union renewed its request for information in Lindo's May 28, 2010 letter and in addition requested a copy of Villanueva's written warning and all statements and notes used by Respondent to determine the disciplinary action. To date none of the requested information has been provided.

This information is directly related to terms and conditions of employment of a disciplined bargaining unit employee and is therefore presumptively relevant. *Disneyland Park,* supra.

Respondent contends that there is no grievance procedure in effect, citing Minicola's letter[74] to Lindo of April 26, 2010. However, that same letter acknowledges that Respondent:

> . . . would follow the employee handbook in effect at the time. The procedure provided that the Union could appeal the decision first to the Hotel's Human Resource Manager. If the Union was dissatisfied with the decision following the first level appeal, the Union had a final appeal to the Hotel's General Manager.

Respondent also contends it is their policy not to provide the Union with employee disciplinary records.

For the reasons set forth above in section III, I find that in refusing to provide information requested on May 28, 2010, in conjunction with a grievance filed on behalf of disciplined Villanueva, violated Section 8(a)(1) and (5) of the Act.

June 8, 2010

By letter[75] dated June 8, 2010, the Union requested information from Respondent including (1) disciplinary action issued to housekeeping employees from December 1, 2001, to the present. (2) Daily room assignments for housekeeping employees from April 19, 2010, to the present. (3) A list of employees who earned perfect attendance awards from 2007 to 2009 and the number of days off each employee received per year. (4) All department work schedules from December 1, 2007, to the present. Other than furnishing on December 7, 2010, departmental work schedules for the period August 29 to December 4, 2010, Respondent has furnished no information responsive to the Union's June 8, 2010 information request.

In defense, Respondent contends its policy is not to give out disciplinary records, that it had restored room assignments, that it did not have records on perfect attendance awards for 2007, that Mori should have told Respondent who did not receive perfect attendance awards for 2008–2009, and that Respondent provided some work schedules.

Bargaining unit employee disciplinary records are presumptively relevant and an employer must provide them to the union upon request. *Grand Rapids Press,* 331 NLRB 296, 299 (2000); *Antioch Rock & Ready Mix,* 328 NLRB No. 116, slip op. at 1 (1999) (not reported in Board volumes).

The daily room assignments for housekeeping employees are presumptively relevant. See *Superior Protection, Inc.,* 341 NLRB 267, 269 (2004). See *Disneyland Park,* supra at 1257.

Respondent maintains an employee incentive program called the perfect attendance award in its employee handbook.[76] The award consists of an additional paid day off when an employee has no sick leave, suspension, leave of absence without pay, and no more than four tardies within a calendar year. The employee may accumulate up to 5-paid days off if the employee continues to meet the requirements for multiple consecutive 12-month periods.

The perfect attendance award is an unmistakable term and condition of employment because it is an incentive program which rewards employees for stellar attendance at work. The requested information is therefore presumptively relevant because it is directly related to a term and condition of employment for bargaining unit employees and lies at the core of the employee-employer relationship. *Cross Pointe Paper Corp.,* 317 NLRB 558, 558–559 (1995).

Work schedules and information relating thereto are presumptively relevant. *Castle Hill Health Care Center,* 355

[72] GC Exh. 48.
[73] GC Exh. 53.
[74] GC Exh. 38.
[75] GC Exh. 49.
[76] R. Exh. 7, p. 27.

NLRB 1156, 1183–1184 (2010); *Le Rendezvous Restaurant,* 323 NLRB 445, 453 (1997).

Minicola waited until about December 7, 2010, to finally provide the Union with copies of departmental work schedules from August 29 to December 4, 2010, but Minicola did not provide schedules for the period prior to August 29, 2010. Minicola did not offer an explanation for his 6 months of dawdling before providing the Union with some requested work schedules. By unreasonably delaying the provision of some work schedules for 6 months, Respondent violated Section 8(a)(5) and (1). *Hawaii Tribune-Herald,* 356 NLRB No. 63, slip op. at 3, 24–25. (2010).

Rather than providing Respondent with a defense, Minicola's testimony revealed an absolute failure to comprehend that all the requested information was presumptively relevant and, therefore, the Union was not required to provide Respondent with any further justification for these requests. *Disneyland Park,* supra at 1257.

By failing to provide or to provide the information requested on June 8, 2010, in a timely manner, Respondent violated Section 8(a)(1) and (5) of the Act.

July 16, 2010

By letter[77] dated July 16, 2010, the Union requested information from Respondent concerning employee Villanueva's suspension. The information requested included a copy of Villanueva's disciplinary action and the reason he was suspended together with supporting documents. The information request was renewed by letter[78] of July 26, 2010, and added a request for Respondent's investigative records. On August 6, 2010,[79] the Union renewed its July 16 and 26 requests and further requested any documents relied upon in terminating Villanueva. Other than furnishing a copy of the Counseling/Infraction of company Rules Form signed on July 28, 2010, by Minicola and Ko, Respondent has furnished none of the information requested.

This information is directly related to terms and conditions of employment of a disciplined bargaining unit employee and is therefore presumptively relevant. *Disneyland Park,* supra at 1257.

Respondent contends that there is no grievance procedure in effect, citing Minicola's letter[80] to Lindo of April 26, 2010. However, that same letter acknowledges that Respondent:

> . . . would follow the employee handbook in effect at the time. The procedure provided that the Union could appeal the decision first to the Hotel's Human Resource Manager. If the Union was dissatisfied with the decision following the first level appeal, the Union had a final appeal to the Hotel's General Manager.

Respondent also contends it is their policy not to provide the Union with employee disciplinary records.

For the reasons cited above in refusing to provide the information requested by the Union in its July 16, 2010 letter, Respondent violated Section 8(a)(1) and(5) of the Act.

August 12, 2010

Since at least June 24, 2010, Respondent has asserted to the Union that it was in financial difficulties to warrant changes to items agreed to tentatively during collective bargaining. Thus, in his June 25, 2010 letter[81] to Mori, Minicola stated:

> As you know, at our meeting (June 24, 2010) I provided notice to you and the other Union officials present that because of ongoing economic hardships, the Hotel, as of July 1, 2010, will be, but not limited to, reinstating the previous housekeeping rooms guideline, providing notice of the temporary stoppage of the company contribution to the 410(k) plan for employees as of August 1, 2010 and maintaining the drug plan.

Accordingly, on June 25, 2010,[82] since it appeared Respondent was "pleading poverty" Mori demanded the opportunity to have a CPA review Respondent's financial records to verify Respondent's assertion. Mori requested (1) an independent auditor's complete financial report for the past 2 years including balance sheets, statement of operations, and statements of cash flows. (2) Corporate income tax returns for 2 years. (3) Interim financial statements for the current year. (4) A schedule showing breakdowns of executive compensation, wages paid to bargaining unit employees and wages paid to all other employees for the past 2 years.

On June 29, 2010,[83] Minicola responded to Mori's June 25 letter. Minicola agreed to provide the "independent auditor" only the information that had been provided to Subregion 37 during its investigation of the unfair labor practice.[84] This information consisted of one-page Statements of Income and Loss for 2008 and 2009.

The Union selected CPA Lowell Nagaue to review Respondent's financial information and so advised Respondent on June 30, 2010.[85] On August 12, 2010,[86] Nagaue indicated the only financial information he had received from Respondent were Statements of Income and Loss for 2008 and 2009. Nagaue stated that these statements were insufficient to analyze the financial condition of the Hotel. He further asked Respondent to provide him with the information Mori had requested on June 25, 2010. On August 23, 2010,[87] Nagaue reiterated his information request of August 12, 2010. At the hearing, Naguae explained that the Statements of Income and Loss were insufficient to analyze the financial strength of Respondent.

In their brief, Respondent misrepresents Nagaue's testimony concerning the adequacy of the information he needed to assess their financial status. Respondent stated that Nagaue testified that there were no accounting standards for what information is necessary to determine the financial condition of a company.

[77] GC Exh. 84.
[78] GC Exh. 85.
[79] GC Exh. 86.
[80] GC Exh. 38.
[81] GC Exh. 54.
[82] GC Exh. 55.
[83] GC Exh. 57.
[84] GC Exhs. 78, 79.
[85] GC Exh. 58.
[86] GC Exh. 72.
[87] GC Exh. 74.

What Nagaue actually said was there were no accepted accounting principles for determining the financial condition of a company when engaged to do so by the Union.[88] Respondent further mischaracterizes Nagaue's testimony concerning what financial records he needs to make an assessment of financial status of a company, suggesting that Respondent's one-page Statements of Income were sufficient. Nagaue made it clear that while he had not always received all of the financial records he requested when performing a financial assessment, he received at least interim financial statements from the Company's accountant.[89]

To date, other than the Statements of Income and Loss, Respondent has furnished no other financial information to the Union or to Nagaue.

Board law is unmistakably clear that an employer's claim of inability to pay triggers a concomitant duty to supply to a union, upon request, financial information to substantiate its claim. *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1956); *R.E.C. Corp.,* 307 NLRB 330, 332–333 (1992), citing *Clemson Bros.,* 290 NLRB 944 (1988).

Unsurprisingly, uncertified financial statements have not been considered sufficient to meet an employer's obligations under *Truitt,* supra, *R.E.C. Corp.,* 307 NLRB at 33, or *Hiney Printing* Co., 262 NLRB 157,162 (1988).

In *REC*, supra at 333, the Board affirmed the administrative law judge who found:

> Respondent argues initially that on December 1 it offered to supply the Union with information adequate to support its claim of financial inability to pay. *Albany Garage,* 126 NLRB 417, 418 (1960). I do not agree. While Respondent did offer to supply the Union its financial statements for the past 5 years, these statements for the past 2 years were not certified . . . . Indeed even absent such evidence of financial "looseness" of employers, uncertified financial statements have not been deemed sufficient to meet the employers' obligations under *Truitt American Model & Pattern*, 277 NLRB 176, 184 (1985); *Hiney Printing Co.*, 262 NLRB 157, 162 (1982); see also *Tony's Meats*, 211 NLRB 625, 626 (1974). (Employer must permit CPA to examine employer's records.)

Nagaue testified that Respondent's financial summaries were uncertified and that he was unable to verify any of the figures provided by Respondent. Nagaue explained that certification is necessary for the reader of a financial statement to place reliance on the figures contained in any document.

Respondent argues that the Union's request for financial information must be weighed against an employer's confidentiality concerns. Respondent cites *Albany Garage, Inc.,* 126 NLRB 417 (1960), to support its argument.

While confidentiality is a factor that may limit disclosure of certain documents, the burden is on the objecting party to establish the need to limit disclosure. The administrative law judge, affirmed by the Board, in *REC,* supra at 333, held:

> However, the union's interest in arguably relevant information does not always predominate over all other interests. There are situations where an employer may be justified in limiting or conditioning the disclosure of otherwise relevant information. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *Yakima Frozen Foods*, 130 NLRB 1269, 1273 (1960), enfd. in pertinent part 316 F.2d 389 (D.C. Cir. 1963). In evaluating a requested condition, the important question to be decided is whether the employer has asserted a legitimate and substantial justification for limiting the disclosure. *Detroit Edison*, supra; *Plough, Inc.*, 262 NLRB 1095, 1096 (1982). The party asserting the need for the limitation or condition has the burden of proof on that question. *Washington Gas Light Co.*, 273 NLRB 116, 117 (1984); *Boise Cascade Co.*, 279 NLRB 422, 431 (1986); *McDonnell Douglas Corp.*, 224 NLRB 881, 890 (1976).

Here, Respondent has provided no compelling evidence to limit disclosure of the financial information necessary to establish their claim of financial difficulties, particularly in view of Nagaue's signature of a confidentiality statement[90] regarding Respondent's financial records.

Moreover, *Albany Garage*, supra, cited by Respondent is clearly distinguishable. There the Board concluded that the employers had furnished the union financial statements, plus comparative profit and sales and profit statements; no question was ever issued regarding the accuracy of the financial information submitted by the union; these statements had been accepted as adequate by banks with which respondent did business and the Internal Revenue Service (IRS); and the union had been furnished in prior years with the same records and had never rejected such documents as inadequate. Here, the factors relied on by the Board in *Albany Garage* were not present. Most importantly, the Nagaue questioned the accuracy of the documents offered by Respondent, and in fact had reasonable grounds for making such a contention.

I find that in failing to provide to Nagaue the financial records requested by the Union to establish Respondent's claim of "poverty" Respondent violated Section 8(a)(1) and (5) of the Act.

## CONCLUSIONS OF LAW

1. The Respondent, HTH Corporation, Pacific Beach Corporation and KOA Management, LLC, together doing business as Pacific Beach Hotel, constitutes a single employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. Each is therefore jointly and severally responsible for the remedy of the unfair labor practices of the others.

2. International Longshore and Warehouse Union, Local 142 is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since the Board certified it as the 9(a) representative of the hotel employees on August 15, 2005, the Union has represented a majority of the Hotel's employees in the appropriate bargaining unit.

[88] Tr. 1954, LL. 7–11.

[89] Tr. 1957, LL.1–25, Tr. 1958, LL. 1–5.

[90] GC Exh. 68.

4. By engaging in the following conduct, the Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act.

a. On or about May 14, 2010, disparaged the Union by notifying employees that Union agents Dave Mori and Carmelita Labtingao were barred from entering the Hotel.

b. On or about September 10, 2010, by engaging in surveillance of its employees activities protected by Section 7 of the Act.

c. On or about September 10, 2010, by threatening Union Agent Patrick DeCosta with removal from a public sidewalk while he was engaged in handing out union literature to Respondent's employees.

5. The Respondent committed unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by issuing a written warning to Rhandy Villanueva on May 20, 2010, by suspending him on July 12, 2010, and by discharging him on July 28, 2010, because he was a union activist.

6. By engaging in the following conduct, the Respondent committed unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

a. On or about January 1 through May 1, 2010, the Respondent unilaterally and without bargaining with the Union ceased making matching contributions to employees' 401(k) plans.

b. On or about May 6, 2010, Respondent unilaterally and without bargaining with the Union barred Union Representatives Dave Mori and Carmelita Labtingao from the hotel property in violation of the parties agreed upon access policy.

c. On July 1, 2010, the Respondent unilaterally and without bargaining with the Union changed housekeepers' workloads by adding 2 additional rooms to clean per day, from 16 to 18 rooms per day in the Ocean Tower and from 15 to 17 in the Beach Tower.

d. In November 2009 and in April, May, June, July, and August 2010, the Union made various demands for relevant information concerning Respondent's 401(k) plan and employees who participated in the plan, the grievance regarding George Ishikawa's discipline, the grievance regarding Rhandy Villanueva's written warning, the discipline of housekeeping employees, their work schedules and awards, the grievance concerning Villanueva's suspension and termination, and financial data regarding Respondent's claim of poverty. The Respondent did not reply to any of these requests or did not provide the requested information in a timely manner.

## REMEDY

Counsel for the Acting General Counsel requests that the administrative law judge order a third broad cease-and-desist order that a senior level management official to read the notice to employees to assembled employees during worktime, that the notice to employees be read to employees assembled during worktime by Respondent's CEO, Corine Watanabe, and President John Hayashi, in the presence of Minicola or in the alternative that Minicola, be required to publicly read the notice to employees in the presence of Watanabe and Hayashi. Counsel for the Acting General Counsel also requests that the remedy permit a Board agent to be present for the reading of the notice to employees.

This case presents yet another example of this Respondent's efforts to impede its employees free exercise of their rights guaranteed under Section 7 of the Act. The Board noted with approval the judge's proposed remedy of a broad cease-and-desist order in *HTH I,* supra at 8, justified " . . . in light of the Respondent's proclivity to violate the Act and their serious misconduct that demonstrates a general disregard for their employees' fundamental rights, . . . See *Hickmott Foods*, 242 NLRB 1357 (1979)."

In view of Respondent's ongoing violations of the Act, I agree that a broad order enjoining Respondent from violating the Act in any other manner is warranted.

In *HTH I,* the Board also ordered Respondent to have the notice to employees notice publicly read by a responsible corporate executive in the presence of a Board agent or, at the Respondent's option, by a Board agent in the presence of a responsible corporate executive citing *Homer D. Bronson Co.*, 349 NLRB 512, 515–516 (2007), enfd. mem. 273 Fed.Appx. 32 (2d Cir. 2008).

In this case, I agree that Respondent's ongoing violations, their disregard for the 10(j) order issued by the United States District Court, despite its provision that, "a responsible management official . . . will read to employees the court's separate-entered order . . . ," justifies that that the notice to employees be read to employees assembled during worktime by Respondent's CEO, Corine Watanabe, and President John Hayashi, in the presence of Minicola or in the alternative that Minicola, be required to publicly read the notice to employees in the presence of Watanabe and Hayashi with a Board agent to be present for the reading of the notice to employees.

The Respondent will be ordered to offer reinstatement to Rhandy Villanueva who it unlawfully terminated and make him whole for any wages or other rights and benefits he may have suffered as a result of the discrimination against him in accordance with the formula set forth in *F. W. Woolworth* Co., 90 NLRB 289 (1950), with interest as provided for in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), and *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[91]

## ORDER

The Respondent, HTH Corporation, Pacific Beach Corporation and KOA Management, Honolulu, Hawaii, their successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Unions as the duly designated representative of a majority of its employees in the bargaining unit appropriate for purposes of collective bargaining, within the meaning of Section 9(b) of the Act:

> All full-time, regular part-time, and regular on call concierge, concierge II, concierge II night auditor, guest service agent I, guest service II, room control clerk, bell help, door attendant,

[91] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, to senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper I, housekeeper II, housekeeper III, laundry attendant I, seamstress, bushelp, waithelp, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet foodrunner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data processing clerk, senior costs control clerk, food and beverage cashier, network support specialist, diver level I, diver level II, diver level III, diver level IV, PBX operator, lead operator, maintenance 2nd, maintenance 1st, mechanic foreman, assistant/general maintenance, maintenance trainee, senior maintenance trainee, maintenance utility, assistant gardener, assistant head gardener and gardener employed at the Pacific Beach Hotel, located at 2490, Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marcom (sic) [marketing], director of revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha Coffee Shop Manager, income auditor manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

(b) Unilaterally implementing terms and conditions of employment during the course of collective bargaining without the parties having reached a genuine impasse, including access of union agents to the hotel property, making payments to employees 401(k) plans, and implementing changed room assignments to housekeeping employees.

(c) Failing and refusing to furnish the Union with the information the Union has requested which is necessary and relevant to the collective-bargaining process and to fulfill its obligations as representative of bargaining unit employees.

(d) Warning, suspending, or terminating employees because they engaged in union activities.

(e) Engaging in surveillance of employees union activities.

(f) Disparaging the Union by telling employees that union agents are barred from entering the Hotel.

(g) Threatening union agents with removal from the public sidewalk for passing out union literature.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately bargain in good faith with the Union.

(b) On the Union's request rescind the unilateral changes including restoration of the previously existing condition of employment concerning the room assignments to housekeeping employees to 16 room in the Ocean Tower and 15 rooms in the Beach Tower and the access policy concerning union agents Mori and Labtingao.

(c) Reimburse employees for matching contributions to their 401(k) plans for the period January 1 to May 1, 2010.

(d) Furnish the necessary and relevant information requested by the Union in November 2009 and in April, May, June, July, and August 2010.

(e) Within 14 days from the date of this Order offer immediate and full reinstatement to Rhandy Villanueva to his former job or, if that job no longer exists, to a substantially equivalent position, without loss of seniority or other privileges and make him whole with interest as provided in the remedy section of this decision.

(f) Within 14 days from the date of this Order remove from its files any reference to the unlawful written warning, suspension, and termination of Rhandy Villanueva and within 3 days thereafter notify him in writing that this has been done and that the written warning, suspension and termination will not be used against him in any way.

(g) Preserve and, within 14 days of a request, make available at reasonable places designated by the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its hotel in Honolulu, Hawaii, and mail a copy thereof to each bargaining unit member laid off subsequent to May 6, 2010, copies of the attached notice marked "Appendix."[92] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by

[92] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 6, 2010.

(i) Within 60 consecutive days of the date of the Board's Order, convene the bargaining unit employees during working times at the Respondent's hotel by shifts, whereupon Respondent's CEO, Corine Watanabe, and President John Hayashi, in the presence of Minicola or in the alternative that Minicola in the presence of Watanabe and Hayashi with a Board agent to be present, be required to publicly read the notice to employees.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington D.C., September 13, 2011.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees in both English and Spanish and to abide by its terms.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT refuse to bargain with the Union as the duly designated representative of a majority of its employees in the bargaining unit appropriate for purposes of collective bargaining, within the meaning of Section 9(b) of the Act:

> All full-time, regular part-time, and regular on call concierge, concierge II, concierge II night auditor, guest service agent I, guest service II, room control clerk, bell help, door attendant, head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, to senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper I, housekeeper II, housekeeper III, laundry attendant I, seamstress, bushelp, waithelp, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet foodrunner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data processing clerk, senior costs control clerk, food and beverage cashier, network support specialist, diver level I, diver level II, diver level III, diver level IV, PBX operator, lead operator, maintenance 2nd, maintenance 1st, mechanic foreman, assistant/general maintenance, maintenance trainee, senior maintenance trainee, maintenance utility, assistant gardener, assistant head gardener and gardener employed at the Pacific Beach Hotel, located at 2490, Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marcom (sic) [marketing], director of revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha Coffee Shop Manager, income auditor manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

WE WILL NOT unilaterally implement terms and conditions of employment during the course of collective bargaining without the parties having reached a genuine impasse, including access of union agents to the hotel property, making payments to employees' 401(k) plans and implementing changed room assignments to housekeeping employees.

WE WILL NOT fail and refuse to furnish the Union with the information the Union has requested which is necessary and relevant to the collective-bargaining process and to fulfill its obligations as representative of bargaining unit employees.

WE WILL NOT warn, suspend, or terminate employees because they engaged in union activities.

WE WILL NOT engage in surveillance of employees' union activities.

WE WILL NOT disparage the Union by telling employees that union agents are barred from entering the Hotel.

WE WILL NOT threaten union agents with removal from the public sidewalk for passing out union literature.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL immediately bargain in good faith with the Union.

WE WILL on the Union's request rescind the unilateral changes including restoration of the previously existing condition of employment concerning the room assignments to housekeeping employees to 16 room in the Ocean Tower and 15 rooms in the Beach Tower and the access policy concerning union agents Mori and Labtingao.

WE WILL reimburse employees for matching contributions to their 401(k0 plans for the period January 1 to May 1, 2010.

WE WILL furnish the necessary and relevant information requested by the Union in November 2009 and in April, May, June, July, and August 2010.

WE WILL offer employee Rhandy Villanueva reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position of employment without any loss of rights and benefits, and WE WILL, make him whole for any loss of wages or other benefits he may have suffered as the result of the discrimination against him.

WE WILL notify Rhandy Villanueva that we have removed from our files any reference to his written warning, suspension and termination and that the warning, suspension and termination will not be used against him in any way.

HTH CORPORATION, PACIFIC BEACH CORPORATION, AND KOA MANAGEMENT, LLC, A SINGLE EMPLOYER, D/B/A PACIFIC BEACH HOTEL